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Supreme Court, U.S.
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NO.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1998

GEORGE KILLINGER, Warden
Petitioner

v

LARRY NEVERS
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SIXTH CIRCUIT COURT OF APPEALS

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21 pp

STATEMENT OF THE QUESTION PRESENTED

DOES THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT, 28 USC §2254, SUPERCEDE THE "BRECHT/O'NEAL" STANDARD FOR THE DETERMINATION OF HARMLESS CONSTITUTIONAL ERROR ON HABEAS CORPUS REVIEW, AND IF SO, DID THE COURT OF APPEALS ERR IN FINDING THAT THE AEDPA "UNREASONABLE APPLICATION OF CLEARLY ESTABLISHED FEDERAL LAW" TEST AND THE "BRECHT/O'NEAL" TEST ARE NONETHELESS IDENTICAL?

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The opinion of the United States Court of Appeals for the Sixth Circuit is as yet unpublished and is attached as Appendix A. The opinion of the Michigan Supreme Court is attached as Appendix B, and is published at 456 Mich 77, 566 NW2d 229 (1997).

STATEMENT OF JURISDICTION

The Sixth Circuit Court of Appeals issued its judgment and opinion on March 1,1999. This Court's jurisdiction is invoked under 28 USC §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment VI to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...

Amendment XIV provides, in pertinent part:

> ...nor shall any State deprive any person of life, liberty, or property, without due process of law...

STATEMENT OF THE CASE

On August 23, 1993, Respondent was convicted of second degree murder following a jury trial. Respondent was sentenced to a term to twelve to twenty-five years in prison. On May 2, 1994, the trial court denied Respondent's motion for new trial.

The pertinent facts are stated in the Sixth Circuit Court of Appeals opinion:

"Nevers and his partner, Budzyn, both of whom are white, were on plainclothes duty after dark in an unmarked car when they observed Malice Green, an African-American, driving a bullet-riddled car carrying one passenger, pull up in front of a house known to the officers as one used for drug activity. Nevers and Budzyn initiated an investigation of the car and its occupants, and Nevers asked Green for his drivers license. Green did not respond to Nevers's request but instead went around to the passenger's side of the car, sat down in the car with his legs hanging out of the open passenger door, and began to rummage around in the glove compartment. When

Budzyn shined his flashlight on Green and repeated Nevers's request to see Green's driver's license, Green reached down and grabbed something that had apparently fallen from the glove compartment onto the floor of the car. Budzyn, suspecting that the object was cocaine, asked Green what he was holding and asked him to relinquish it. Green neither responded nor complied. At this point Budzyn and Nevers undertook to force Green to give up what he was holding, and in the ensuing struggle, Nevers struck Green repeatedly on the hands and head with a flashlight.

During the course of the incident number of other police officers and two EMS crews arrived. According to the first two technicians to arrive on the scene, they were driving by and saw Green hanging out of the driver's side of the car, blood streaming form his head and puddling on the ground. Nevers was holding Green with one hand and holding a flashlight with the other, ordering Green to hold still and open his hand. These two technicians agreed that Green looked dazed, that he was squirming and moving around but not

attempting to fight Nevers off, that Green did not comply with Nevers's orders to open his hand, and that Nevers struck Green on the head with the flashlight. Their accounts of the number of blows to the head varied; one technician said he saw Nevers deliver four blows; the other testified to five or six. One of these technicians testified that as soon as he arrived at the scene he approached Nevers and asked him what had happened, and that Nevers replied, 'I hit him. And if he doesn't quit it, I'm gonna hit him again.' The testimony of the second EMS crew, who arrived somewhat later, confirms the general picture painted by the first crew; one of the second crew, however, estimated that Nevers delivered ten blows to Greens head.

At trial, the state introduced the testimony of Dr. Kalil Jiraki, an assistant Wayne County Medical examiner, who testified that Green had suffered at least fourteen separate blunt force blows to the head, and that the cause of death was blunt force trauma to the head. Dr. Jiraki acknowledged that Green was under the influence of cocaine when he died, but

stated that the amount of cocaine in his blood probably did not contribute to his death.

At the close of trial the Nevers jury deliberated nine days before returning a guilty verdict. Nevers received a sentence of twelve to twenty years imprisonment. After the verdict was rendered, Nevers and Budzyn presented to the trial court affidavits from several jurors containing those jurors' statements that in addition to the Malcolm X video, other extraneous information had reached the jury during the trial and jury deliberations, including information that Nevers and Budzyn had allegedly been involved in a police undercover unit called STRESS, reputed to have engaged in harassment of young black men. The trial court refused to hold an evidentiary hearing with regard to the claims of Nevers and Budzyn that the jury had been tainted by this information. The defendant's motion for a new trial was denied."

On March 22, 1995, the Michigan Court of Appeals affirmed Respondent's conviction in an unpublished per curiam opinion. Respondent submitted twelve issues for

consideration of the Michigan Supreme Court. On July 31, 1997, that court issued an opinion adopting the Court of Appeals opinion with respect to eleven of those issues and analyzing one claim, the question of whether extraneous influences on the jury constituted constitutional error. The Michigan Supreme Court applied a harmless error analysis and found that error occurred, but it was harmless beyond a reasonable doubt in light of the overwhelming evidence of Respondent's guilt; it affirmed Respondent's conviction. *People* v *Budzyn*,456 Mich 77,566 NW2d 229 (1997).

On October 8, 1997, Respondent filed a petition for writ of habeas corpus in the United States District Court. Respondent presented six claims of constitutional error to the District Court. The District Court found two of those six claims to be meritorious and issued the writ on December 30, 1997. *Nevers* v *Killinger*,990 F Supp 844 (E D Mich 1997).

On March 1, 1999, the Sixth Circuit Court of Appeals affirmed the District Court's grant of the writ on one basis. The Court of Appeals found that the Antiterrorism and

Effective Death Penalty Act of 1996 provided the standard of review to be used by federal courts reviewing State decisions in habeas corpus cases: a federal court shall not grant a writ of habeas corpus on a claim that has been adjudicated by a State court unless that adjudication "results in a decision that was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States." 28 USC §2254(d)(1). The Sixth Circuit found the issue presented by this case — whether the Michigan Supreme Court's ruling that the extraneous influences on the jury constituted harmless error — was a mixed question of law and fact which required the habeas court to determine whether the State court adjudication involved an unreasonable application of U. S. Supreme Court authority. The Sixth Circuit Court of Appeals went on to say the AEDPA required a federal court to give deference to a State court adjudication "unless reasonable jurists would find it so arbitrary, unsupported or offensive to existing precedent as to be outside the realm of plausible credible outcomes."

After pronouncing this standard, the Court of Appeals proclaimed it to be the equivalent of the standard of *Brecht* v *Abrahamson*, 507 US 619, 113 SCt 1710, 123 LEd2d 353 (1993)-- "whether the error had substantial and injurious effect or influence in determining the jury's verdict"–the court stating:

> We think that when the issue before the federal habeas court is the state court's finding of harmless error, the test set out by the Supreme Court in *Kotteakos* and explicitly reiterated in *Brecht* quite precisely captures Congress's intent as expressed in AEDPA and, therefore, *continues to be applicable*. That test is whether the error "'had substantial and injurious effect or influence in determining the jury's verdict,'" *Brecht*, 507 U.S. at 637; it is the habeas petitioner's burden to demonstrate that the trial error resulted in "actual prejudice." *Id.* If the petitioner is able to make that showing, *he will surely have demonstrated that the state court's finding that the error was harmless beyond a reasonable doubt--the Chapman* standard--was outside the realm of plausible credible outcomes, and therefore resulted from an unreasonable application of *Chapman*.

The Court of Appeals was most concerned with the jury's exposure to the extraneous information that Respondent had at one time been assigned to the police STRESS Unit.[1] The

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1. "STRESS [Stop the Robberies Enjoy Safe Streets] was a controversial decoy unit of the Detroit Police Department

Court of Appeals concluded that the Michigan court's harmless error analysis was deficient because this extraneous information reflected upon the credibility of Respondent and could have compromised the jury's verdict.

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that gained a reputation for brutality. A juror from the Nevers trial stated that 'it was explained during deliberations that STRESS was a police group that regularly abused young black males in the city.' Nevers was apparently previously a member of this unit, while defendant Budzyn apparently was not previously a member" *People v Budzyn*, at 90, fn 12.

REASONS FOR GRANTING THE WRIT

Only this Court can breathe life into the recent Congressional reform of habeas corpus law by resolving the dispute among federal circuits concerning implementation of the new standard of review and overcoming the apparent reluctance of some federal courts to relinquish de novo review. In April, 1996, Congress passed the Antiterrorism and Effective Death Penalty Act (hereafter denominated the AEDPA) which amended the standard of review applicable to petitions for habeas corpus to provide that a federal court "shall not" grant relief on a claim that has been adjudicated in a State court unless that adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 USC §2254(d)(1). This case, and most cases of the several circuits interpreting the AEDPA, concerns the application of the second clause of §2254(d)(1) — "involved an unreasonable application" —

which is pertinent to resolving a question of fact or a mixed question of law and fact.

There is a split of opinion among those circuits which have directly addressed the question of the level of deference which is demanded by the statute's requirement that relief be denied unless the application of settled Federal law by the State court was "unreasonable." In *Herbert* v *Billy*,__ F3d __ (CA 6, 1998) the Sixth Circuit joined the Fourth, Fifth, Ninth, Tenth and Eleventh Circuits[2] in agreeing that a State court decision is unreasonable under the AEDPA if *so clearly incorrect that it would not be debatable among reasonable jurists.* The Seventh Circuit, on the other hand, has stated both that a decision is not unreasonable if it is one of several equally plausible outcomes, and that it is not unreasonable if minimally consistent with the facts and circumstances of the

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2. *Green* v *French*, 143 F3d 865 (CA 4, 1998); *Drinkard* v *Johnson*, 97 F3d 751 (CA 5, 1996); *Jeffries* v *Wood*, 114 F3d 1484 (CA 9, 1997); *Neeley* v *Nagle*, 138 F3d 917 (CA 11, 1998); and the unpublished opinion of *White* v *Scott*, 141 F3d 1187 (1998) (Table).

case. *Hennon* v *Cooper*, 109 F3d 330 (CA 7, 1997); *Hall* v *Washington*,106 F3d 742 (CA 7, 1997).

In *O'Brien* v *Dubois*,145 F3d 16 (CA 1, 1998) the First Circuit rejected both approaches and enunciated its own test: "for the writ to issue, the state court decision must be so offensive to existing precedent, so devoid of record support, or so arbitrary, as to indicate that it is outside the universe of plausible, credible outcomes." In this case, the Court of Appeals appropriated the language of O'Brien as a means of giving clarity to the "debatable among reasonable jurists" test which the Sixth Circuit had already adopted. Petitioner would accept that this case holding does not create a new hybrid test, but rather provides a clear and comprehensive manner of stating the "debatable among reasonable jurists" test. However, the Court of Appeals's *application* of the test in this case is so flawed as to reveal a strong reluctance to move from the de novo mode of review to a deferential review of State court decisions, which of course is what is mandated by the AEDPA

In this case, the Court of Appeals began its analysis of the issue -- extraneous influences on the jury — by acknowledging that the error was appropriately classified as trial error subject to the *Chapman* v *California*, 386 US 18 (1967) harmless error analysis which the Michigan Supreme Court *did* apply. Noting that this Supreme Court created a distinction between direct and habeas review of State court decisions, the Court of Appeals found that standard explicated for habeas review in *Brecht* v *Abramson*, 507 US 619, 113SCt 1710, 123 LEd2d 353 (1993) and *O'Neal* v *McAninch*, 513 US 432, 115 SCt 992, 130 Led2 947 (1995) is fundamentally the same as that of the AEDPA:

> We have already explained that under the highly deferential standard of the AEDPA we may not find the state court's application of federal law unreasonable unless rational jurists would find it so arbitrary, unsupported or offensive to existing precedent as to be outside the realm of plausible credible outcomes. We think that when the issue before the federal habeas court is the state court's finding of harmless error, **the test set out by the Supreme Court in Kotteakos and explicitly reiterated in Brecht quite precisely captures Congress's intent as expressed in the AEDPA and, therefore, continues to be applicable**. That test is whether the error had substantial and

> injurious effect or influence in determining the jury's verdict, Brecht, 507 U.S. at 637;.... [Emphasis added].

Thus, the Court of Appeals found its task to be to determine, as a matter of *de novo* review whether the error 'had a substantial and injurious effect or influence in determining the jury's verdict.' *Nevers* at p 38, quoting *Brecht,* 507 US at 637. Petitioner argues that the Court of Appeals's focus was misplaced; rather than reassessing the evidence to determine whether it, in the opinion of the Court of Appeals, could have had an injurious influence upon the jury, the Court of Appeals should have determined whether the under the evidence the Michigan Supreme Court's holding was "debatable among rational jurists," so as to be "within the realm of plausible outcomes."

That the Court of Appeals failed to apply the AEDPA standard is plain, and is the result of a logical error by that court. After citing the standard of *Brecht* for harmless error on habeas review–that, as a matter of *de novo* review, the reviewing court must find (or be in grave doubt as regarding)

that the error "'had substantial and injurious effect or influence in determining the jury's verdict'"–the Court held that "If the petitioner is able to make that showing, *he will surely have demonstrated that the state court's finding that the error was harmless beyond a reasonable* doubt--the *Chapman* standard--was outside the realm of plausible credible outcomes, and *therefore* resulted from an unreasonable application of *Chapman*." This is a logical fallacy. That as a matter of original consideration a court might convinced by a *lower* standard of prejudice does not *ipso facto* mean that the failure of a different court to be convinced by a *higher* standard of prejudice is irrational! For example, in considering the sufficiency of the evidence to convict in a criminal case, the reviewing judge or court is not to ask whether he or she is convinced beyond a reasonable doubt, but whether a rational juror *could* be convinced beyond a reasonable doubt, taking the evidence in the light most favorable to the prosecution. It would surely be inappropriate for the reviewing judge or court to make this assessment by

concluding that he or she is not personally convinced by a standard of clear and convincing evidence by the proofs, and *therefore* the jury's finding of guilt is necessarily irrational. But this is precisely what the Court of Appeals has done in this case.

Petitioner therefore submits that an issue of significance to the jurisprudence of the Nation, with considerations of state-federal relations involved, is presented in this case, which requires the prompt attention of this Court.

CONCLUSION

Wherefore, the Petitioner respectfully requests that plenary review be granted in this case.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Larry NEVERS, Petitioner-Appellee,
v.
George KILLINGER, Warden of FMC Fort Worth, Forth Worth, Texas, Respondent--Appellant,
Kenneth McGinnis; Michigan Department of Corrections, Respondents.

No. 98-1039.

United States Court of Appeals,
Sixth Circuit.

Argued Sept. 25, 1998.

Decided March 1, 1999.

Appeal from the United States District Court for the Eastern District of Michigan at Detroit. No. 97-75175--Lawrence P. Zatkoff, Chief District Judge.

ARGUED: Olga Agnello, OFFICE OF THE PROSECUTING ATTORNEY, COUNTY OF WAYNE, Detroit, Michigan, for Appellant. Neil H. Fink, LAW OFFICES OF NEIL H. FINK, Birmingham, Michigan, for

Appellee. ON BRIEF: Olga Agnello, OFFICE OF THE PROSECUTING ATTORNEY, COUNTY OF WAYNE, Detroit, Michigan, for Appellant. Neil H. Fink, David A. Koelzer, LAW OFFICES OF NEIL H. FINK, Birmingham, Michigan, for Appellee.

Before: NORRIS, BATCHELDER, and BRIGHT, [FN*] Circuit Judges.

BATCHELDER, J., delivered the opinion of the court, in which NORRIS, J., joined. BRIGHT, J. (pp. ---- - ----), delivered a separate opinion concurring in the result.

ALICE M. BATCHELDER.

Petitioner-Appellee Larry Nevers and Walter Budzyn, Detroit Police Officers, were convicted of second degree murder in a Michigan state court in the beating death of Malice Green. They were tried jointly but by separate juries. [FN1] In their consolidated appeal as of right they raised claims concerning, inter alia, extrinsic influences on the jury and pre-trial publicity. People v. Budzyn, Nos.

170477, 170478, slip op. (Mich.Ct.App. March 22, 1995) (unpublished per curiam). The Michigan Court of Appeals affirmed their convictions. Id. The Michigan Supreme Court affirmed the court of appeals on the basis of the court's opinion except for the extrinsic jury influences issue, finding as to that issue "a real and substantial possibility that these external influences together could have affected the juries' verdicts." People v. Budzyn, 456 Mich. 77, 566 N.W.2d 229, 240 (Mich.1997). After performing a harmless error analysis, however, the court affirmed Nevers's conviction by finding overwhelming evidence of guilt, but reversed Budzyn's conviction and remanded his case for a new trial. Id. at 240-43.

Nevers petitioned for a writ of habeas corpus. The district court issued the writ, holding both that the trial court's decision not to grant a change of venue due to pervasive pre-trial publicity was "manifest error," Nevers v. Killinger, 990 F.Supp. 844, 855-64 (E.D.Mich.1997), and that the

extraneous influences on the jury constituted constitutional error which was not "harmless," id. at 864-74. For the reasons stated below, we affirm the judgment of the district court granting the writ. We affirm the reasoning of the district court granting the writ on the claim that Nevers was denied a fair trial because of extraneous influences on the jury; and we reverse the reasoning and conclusions of the district court on the claim that Nevers was denied a fair trial because of pretrial publicity.

BACKGROUND

The facts of the beating of Malice Green are set out in the published opinions of both the federal district court and the Michigan Supreme Court, [FN2] and we need not exhaustively detail them again. Essential to the petition for habeas corpus before us on appeal are the facts that follow.

Nevers and his partner, Budzyn, both of whom are white, were on plainclothes duty after dark in an unmarked car when they observed Malice Green, an African-American,

driving a bullet-riddled car carrying one passenger, pull up in front of a house known to the officers as one used for drug activity. Nevers and Budzyn initiated an investigation of the car and its occupants, and Nevers asked Green for his driver's license. Green did not respond to Nevers's request but instead went around to the passenger's side of the car, sat down in the car with his legs hanging out of the open passenger door, and began to rummage around in the glove compartment. When Budzyn shined his flashlight on Green and repeated Nevers's request to see Green's driver's license, Green reached down and grabbed something that had apparently fallen from the glove compartment onto the floor of the car. Budzyn, suspecting that the object was cocaine, asked Green what he was holding and asked him to relinquish it. Green neither responded nor complied. At this point Budzyn and Nevers undertook to force Green to give up what he was holding, and in the ensuing struggle, Nevers struck Green repeatedly on the hands and head with a flashlight.

During the course of the incident a number of other police officers and two EMS crews arrived. According to the first two technicians to arrive on the scene, they were driving by and saw Green hanging out of the driver's side of the car, blood streaming from his head and puddling on the ground. Nevers was holding Green with one hand and holding a flashlight with the other, ordering Green to hold still and open his hand. These two technicians agreed that Green looked dazed, that he was squirming and moving around but not attempting to fight Nevers off, that Green did not comply with Nevers's orders to open his hand, and that Nevers struck Green on the head with the flashlight. Their accounts of the number of blows to the head varied; one technician said he saw Nevers deliver four blows; the other testified to five or six. One of these technicians testified that as soon as he arrived at the scene he approached Nevers and asked him what had happened, and that Nevers replied, "I hit him. And if he doesn't quit it, I'm gonna hit him again." The testimony

of the second EMS crew, who arrived somewhat later, confirms the general picture painted by the first crew; one of the second crew, however, estimated that Nevers delivered ten blows to Green's head.

Whether Green attempted to resist being handcuffed, and who did what to Green during the process of handcuffing him, are the subject of considerable variations in the testimony. At least one witness, however, testified that he saw car keys in Green's hand, and all of the testimony is consistent that Green was repeatedly ordered to drop whatever he held in his hand but refused to do so. Various of the witnesses testified that Green was struck, punched and kicked during and after the handcuffing, and some of those blows were attributed to Nevers. Finally, all of the EMS technicians agreed that shortly after the officers succeeded in handcuffing Green, he had a seizure or seizures and, despite the ministrations by the medical technicians, he died at the scene.

Nevers testified in his own defense. According to his testimony, he was talking with one of the civilians at the scene when Budzyn began to struggle with Green. Nevers ran to the passenger side of the car with his flashlight in hand. Hearing from Budzyn that Green had something in his hand, Nevers pried Green's clenched fist open. Something which Nevers thought was a rock of cocaine fell out, and Green closed his fist again. Green began to bring his knees up toward Nevers's chest to prevent Nevers from again opening Green's hand, and Nevers struck him on his knees "a couple of times" in an attempt to keep Green from kneeing him. Nevers then grabbed Green's hand and began to strike it, with each strike telling Green to open his hand. Worried that the gathering crowd might jump into the fray, Nevers told the crowd they could all leave. At this point, Budzyn said that Green was trying to get out of the car, so Nevers ran around to the driver's side, getting there as the door was beginning to open. Nevers pulled the door open and Green's head and torso

fell out of the door. Nevers was holding Green by his clothing, when Green grabbed the handle of Nevers's holstered gun, and Nevers hit him on the head. Nevers testified that on an earlier occasion his gun had been taken from him by a suspect he was attempting to apprehend and Nevers did not intend ever to be in that position again. After Green let go of his gun, Nevers said, he did not hit Green again. Seeing an approaching EMS truck, Nevers signaled it to stop. Green then began flailing his left arm around inside the car and when Nevers grabbed it, Green began swinging at him with his clenched right fist, which held something shiny between the fingers. Nevers explained that he feared that the shiny object in Green's hand might have been a knife or razor blade, and he therefore responded by striking Green again on the head, and telling him to open his hand, drop the object, and stop struggling. Nevers said that he struck Green in the head a total of five or six times over the course of the entire incident, and that two of those blows were struck after the

first EMS crew arrived.

At trial, the state introduced the testimony of Dr. Kalil Jiraki, an assistant Wayne County medical examiner, who testified that Green had suffered at least fourteen separate blunt force blows to the head, and that the cause of death was blunt force trauma to the head. Dr. Jiraki acknowledged that Green was under the influence of cocaine when he died, but stated that the amount of cocaine in his blood probably did not contribute to his death.

Nevers introduced his own experts to contradict Dr. Jiraki. One of them, Dr. L.G. Dragovic, testified "that [the] blunt force trauma that was sustained to the brain was not and cannot be taken as a sole cause of death in [this] case." J.A. at 1116-17 (Dr. Dragovic Test.). Rather, Dr. Dragovic maintained that without the cocaine and the chemical produced when alcohol and cocaine are in the body together, both of which were found in Green's bloodstream, Green

would not have suffered a life-threatening seizure due to the blunt force injuries to his head. Dr. Dragovic also testified that there were only eleven blunt force injuries to the brain, rather than fourteen.

A barrage of media publicity began with the first reports of Green's death. Because this incident occurred shortly after the Los Angeles riots that followed the acquittal of the police officers who had beaten Rodney King, the media reports in Detroit compared Green's death to the Rodney King beating and were critical of the police department generally and these police officers specifically.

Budzyn and Nevers were charged with second degree murder. Before the commencement of their trial (which began seven months after Green's beating and death), the Detroit Police Department, without any investigation or trial, fired all of the officers who had appeared at the scene, even those who merely responded to the Officer in Distress call that had gone out. During this time period "[t]he City of

Detroit also agreed to a multimillion dollar settlement with Green's estate. In response to some criticisms of the settlement, a city attorney stated that a generous settlement might spare the city the riotous violence that racked Los Angeles after the acquittal of the police officers." Budzyn, 566 N.W.2d at 234.

Because of the pretrial publicity, Nevers sought but was denied change of venue. Instead, the trial court permitted extensive voir dire regarding the potential jurors' familiarity with the case, including whether they were biased or prejudiced or had any preconceived notions as to guilt or innocence. This voir dire began on June 2, 1993, and lasted at least through June 15.

Trial began on June 18, 1993, and lasted approximately seven weeks. Near the end of the trial, approximately one week before the juries began deliberations, the trial court provided the juries with several film videos with which to entertain themselves during a

period when they were not in court but were required to be in the courthouse. One of the movies provided was "Malcolm X," which begins with a video of the Rodney King beating accompanied by a voice- over of a racially provocative and highly inflammatory speech by Malcolm X charging the "white man" with being one of the greatest murderers in history. Defendants asked for mistrial on this basis but their motion was denied by the independent judge to whom it was referred. [FN3]

At the close of trial the Nevers jury deliberated nine days before returning a guilty verdict. Nevers received a sentence of twelve to twenty years imprisonment. [FN4] After the verdict was rendered, Nevers and Budzyn presented to the trial court affidavits from several jurors containing those jurors' statements that in addition to the Malcolm X video, other extraneous information had reached the jury during the trial and jury deliberations, including information that Nevers and Budzyn had allegedly been involved in a

police undercover unit called STRESS, reputed to have engaged in harassment of young black men. The trial court refused to hold an evidentiary hearing with regard to the claims of Nevers and Budzyn that the jury had been tainted by this information. The defendant's motion for a new trial was denied.

I. THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996

The Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, 110 Stat. 1214 (1996) ("AEDPA"), applies to this case because Nevers filed his petition for habeas relief on October 8, 1997, well after the act's effective date of July 26, 1996. See Harpster v. Ohio, 128 F.3d 322, 326 (6th Cir.1997), cert. denied, --- U.S. ----, 118 S.Ct. 1044, 140 L.Ed.2d 109 (1998). The AEDPA amended federal habeas law by, among other things, changing § 2254(d) of the habeas statute to provide as follows:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

The district court applied the AEDPA and concluded that the Michigan Supreme Court's decision affirming Nevers's conviction "resulted in a decision that ... involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" on two separate bases. First, it found the trial so permeated by prejudicial pretrial publicity that the trial court's denial of a change of venue violated the principles enunciated in the Supreme Court's pretrial publicity line of cases. E.g., Irvin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961); Rideau v. Louisiana, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963); Estes v. Texas, 381 U.S.

532, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965); Sheppard v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966); Murphy v. Florida, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975); and Patton v. Yount, 467 U.S. 1025, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984). See Nevers, 990 F.Supp. at 853-64. Second, it agreed with the Michigan Supreme Court that the extraneous influences on the jury resulted in constitutional error and that such errors were subject to harmless error analysis, but concluded that the evidence of Nevers's guilt was not so overwhelming as to justify a finding of harmless error. See Nevers, 990 F.Supp. at 864-74. We review de novo the legal conclusions involved in the district court's decision to grant or deny the writ under § 2254, but review for clear error its findings of fact. DeLisle v. Rivers, 161 F.3d 370, ----, 1998 WL 817815, at *11 (6th Cir. Nov.30, 1998) (en banc).

As the First Circuit recently recognized, "AEDPA is hardly a model of clarity, ... and its standard of review

provision is far from self- explicating." O'Brien v. Dubois, 145 F.3d 16, 20 (1st Cir.1998) (citation omitted). The truth of this observation is amply demonstrated by the attempts of the circuits to articulate the standards the courts should use in applying the amended § 2254(d).

The Fifth Circuit reads § 2254(d) as addressing three distinct challenges to a state court's decision. See, e.g., Drinkard v. Johnson, 97 F.3d 751, 767 (5th Cir.1996), cert. denied, 520 U.S. 1107, 117 S.Ct. 1114, 137 L.Ed.2d 315 (1997), overruled on other grounds by Lindh v. Murphy, 521 U.S. 320, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997). The "contrary to" clause in § 2254(d)(1) addresses questions of pure law; the "unreasonable application" clause in § 2254(d)(1) addresses mixed questions of law and fact; and § 2254(d)(2) addresses questions of pure fact. See id. at 767-68. The Seventh Circuit has articulated an approach very similar to that of the Fifth Circuit. See Lindh v. Murphy, 96 F.3d 856, 870 (7th Cir.1996) (en banc), rev'd on other

grounds, 521 U.S. 320, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997). [FN5]

In Neelley v. Nagle, 138 F.3d 917 (11th Cir.1998), the Eleventh Circuit developed an approach similar to that of the Fifth and Seventh Circuits. It first "determine[s] the 'clearly established' law at the relevant time," id. at 922, finding helpful guidance for this determination in Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) (new rules should not be applied retroactively in reviewing habeas petitions) and its progeny, id. at 922-23. [FN6] It then applies either the "contrary to" or "unreasonable application" clause in § 2254(d), the former to "errors of pure law," id. at 923, and the latter "[b]y its very language ... to mixed questions of law and fact," id. at 924. According to Neelley, there are two instances in which a state court decision would be "contrary to" clearly established Supreme Court precedent under that phrase's plain meaning: "when a state court faces a set of facts that is essentially the same as those the Supreme

Court has faced earlier" but reaches a different result; and when a state court fails to apply the correct legal principals, as enunciated by Supreme Court case law, to decide a case. Id. at 923.

The Fourth Circuit, in Green v. French, 143 F.3d 865 (4th Cir.1998), enunciated an approach similar to that of the Fifth, Seventh, and Eleventh Circuits:

> [A] decision is "contrary to" precedent only when, either through a decision of pure law or the application of law to facts indistinguishable in any material way from those on the basis of which the precedent was decided, that decision reaches a legal conclusion or a result opposite to and irreconcilable with that reached in the precedent that addresses the identical issue. In contrast, a decision represents an "unreasonable application of" precedent only when that decision applies a precedent in a context different from the one in which the precedent was decided and one to which extension of the legal principle of the precedent is not reasonable, when that decision fails to apply the principle of a precedent in a context where such failure is unreasonable, or when that decision recognizes the correct principle from the higher court's precedent, but unreasonably applies that principle to the facts before it (assuming the facts are insufficiently different from those that gave rise to the precedent as to constitute a new context for consideration of the principle's applicability).

Id. at 870. Green then announced the following standard:

> Defining the terms in this manner, respectively, captures, we believe, the obvious common sense of the statute: If a state court decision is in square conflict with a precedent (supreme court) which is controlling as to law and fact, then the writ of habeas corpus should issue; if no such controlling decision exists, the writ should issue only if the state court's resolution of a question of pure law rests upon an objectively unreasonable derivation of legal principles from the relevant supreme court precedents, or if its decision rests upon an objectively unreasonable application of established principles to new facts.

Id. The Fourth Circuit affirmed that its approach is, in form, very similar to Drinkard, Lindh, and Neelley. See id. at 870-73. Unlike Neelley, however, Green declined to view the term "clearly established Federal law" as a codification of the Teague doctrine. But Green did not provide insight into how that term alternatively should be understood and applied. See id. at 873-74.

The First Circuit, in O'Brien v. Dubois, 145 F.3d 16 (1st Cir.1998), criticized the "bifurcated standard" enunciated by the Fifth and Eleventh Circuits because it engrafts into the statute words--"questions of law," and "mixed questions of law and fact"--which Congress did not place there. See id. at

22-23. Accordingly, the First Circuit came up with its own approach:

> A federal habeas court charged to weigh a state court decision must undertake an independent two-step analysis of that decision. First, the habeas court asks whether the Supreme Court has prescribed a rule that governs the petitioner's claim. If so, the habeas court gauges whether the state court decision is "contrary to" the governing rule. In the absence of a governing rule, the "contrary to" language clause drops from the equation and the habeas court takes the second step. At this stage, the habeas court determines whether the state court's use of (or failure to use) existing law in deciding the petitioner's claim involved an "unreasonable application" of Supreme Court precedent.

Id. at 24.

To help in the determination, "of how specific a rule must be to qualify as dispositive," O'Brien looked to Teague and its progeny, and even referenced Neelley in citation. O'Brien states:

> Drawing on Teague, we hold that an affirmative answer to the first section 2254(d)(1) inquiry--whether the Supreme Court has prescribed a rule that governs the petitioner's claim--requires something more than a recognition that the Supreme Court has articulated a general standard that covers the claim. To obtain relief at this stage, a habeas petitioner must show that Supreme Court precedent requires an outcome contrary to that reached by the relevant state court. Cf. Neelley, 138 F.3d at 923-24.

O'Brien, 145 F.3d at 24-25. O'Brien went on to qualify this requirement, noting that "[a] petitioner need not point a habeas court to a factually identical precedent," id. at 25, because "[o]ftentimes, Supreme Court holdings are 'general' in the sense that they erect a framework specifically intended for application to variant factual situations," id. (citing, in footnote, Waller v. Georgia, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984) ("violation of the right to public trial" test); Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) ("ineffective assistance of counsel" test); and Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) ("insufficiency of the evidence" test)). Thus, according to O'Brien, the proper question for determining when a state court decision is "contrary to" clearly established Supreme Court precedent is

> whether a Supreme Court rule--by virtue of its factual similarity (though not necessarily identicality) or its distillation of general federal law precepts into a channeled mode of analysis specifically intended for application to variant factual situations--can fairly be said to require a particular result in a particular case.

Id. at 25.

Finally, O'Brien explained, if no Supreme Court "rule" can "fairly be said to require a particular result in a particular case," then the "unreasonable application" test applies. Under this second step, inferior federal court decisions which have decided factually similar cases may help "in assessing the reasonableness vel non of the state court's treatment of the contested issue," id. [FN7]

This Circuit was confronted with interpreting § 2254(d) in Harpster v. Ohio, 128 F.3d 322 (6th Cir.1997), cert. denied, --- U.S. ----, 118 S.Ct. 1044, 140 L.Ed.2d 109 (1998). Harpster involved a "heavily fact intensive" question (whether the trial judge should have declared a mistrial), which was both "a mixed question of law and fact" and an issue on which "the Supreme Court has specifically avoided prescribing rigid rules that compel outcomes." Harpster, 128 F.3d at 327. After comparing the similar approaches of the Fifth and Seventh Circuits to that of the First Circuit, [FN8] we declined to adopt either, finding that the differences

between the two approaches would not affect the result in that case because under either approach the panel was called upon to apply the "unreasonable application" clause of § 2254(d)(1). See id. at 326-27. We have not since articulated where we stand on the issue.

The issues in the case before us today involve whether pretrial publicity necessitated a change of venue in order for the defendants to receive a fair trial, and whether the errors surrounding the extraneous influences on the jury were harmless. The former issue, like the issue in Harpster, is a heavily fact-intensive mixed question of law and fact for which there is no clear "rule" enunciated by the Supreme Court requiring a certain result. Therefore, on the question of pretrial publicity, "under either [the Fifth and Seventh Circuits' or the First Circuit's] approach we must decide whether the state court [decision] ... 'involved an unreasonable application of[ ] clearly established Federal law, as determined by the Supreme Court.' " Id. at 327 (quoting 28

U.S.C. § 2254(d)(1)). The extraneous jury influence issue also may be viewed as a "mixed question" case which, under the Fifth and Seventh Circuits' approaches, necessitates review under the "unreasonable application" clause. [FN9] Under the First Circuit's test, the extraneous jury influences issue boils down to a question of "harmless error," an issue on which the Supreme Court has adopted a specific rule, namely the Chapman rule, see generally Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), which governs all state court harmless error review of "trial" errors involving federal constitutional rights. See Brecht v. Abrahamson, 507 U.S. 619, 630, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). However, because "harmless error" cases inevitably are extremely fact-intensive and case-specific, we cannot say that the Supreme Court's Chapman rule is one which "can fairly be said to require a particular result in a particular case," O'Brien, 145 F.3d at 25, and thus this issue under O'Brien would also be governed by the "unreasonable application"

clause of § 2254(d)(1).

Likewise, neither Neelley nor Green counsels consideration of the issues in this case under anything other than the "unreasonable application" clause in § 2254(d)(1). This case involves neither an instance in which "a state court [has] face[d] a set of facts that is essentially the same as those the Supreme Court has faced earlier," but reaches a different result, or in which a state court has failed to apply the correct legal principles, as enunciated by the Supreme Court, to decide a case, the circumstances of which necessitate application of the "contrary to" clause under Neelley. Neelley, 138 F.3d at 923. Similarly, this case does not involve "a decision of pure law or the application of law to facts indistinguishable in any material way from those on the basis of which the precedent was decided.... " See Green, 143 F.3d at 870. Accordingly, as in Harpster, we need not decide today which specific approach we find most persuasive, as they all point to the "unreasonable application" clause in §

2254(d)(1).

The lack of agreement among the circuits is even sharper with regard to the meaning and application of the term "unreasonable application." While all the cases appear to agree that "the 'unreasonable application' clause does not empower a habeas court to grant the writ merely because it disagrees with the state court's decision, or because, left to its own devices, it would have reached a different result," O'Brien, 145 F.3d at 25, [FN10] they do not agree on what the district court must find in order to issue the writ due to an "unreasonable application of[ ] clearly established Federal law," § 2254(d)(1). The disagreement is not about whether the AEDPA requires a high degree of deference to the state court's judgment; rather, it is about how to gauge the degree of deference necessary. The Fifth Circuit holds

> that an application of law to facts is unreasonable only when it can be said that reasonable jurists considering the question would be of one view that the state court decision is incorrect. In other words, [the court will] ... grant habeas relief only if a state court decision is so clearly incorrect that it would not be debatable among reasonable jurists.

Drinkard, 97 F.3d at 769. The Fourth and Eleventh Circuits have expressly adopted this test as their own. See Green, 143 F.3d at 870, 873; Neelley, 138 F.3d at 924. However, the First Circuit has specifically declined to adopt the Drinkard test and instead has stated that "for the writ to issue, the state court decision must be so offensive to existing precedent, so devoid of record support, or so arbitrary, as to indicate that it is outside the universe of plausible, credible outcomes." O'Brien, 145 F.3d at 25 & n. 7. The Seventh Circuit has articulated divergent standards. See Lindh v. Murphy, 96 F.3d at 871 (stating that a state court's " 'reasonable' decision ... must be honored," but failing to articulate what that might be other than to say that a federal court must "take into account the care with which the state court considered the subject"); Hennon, 109 F.3d at 335 (specifically rejecting the "care-with-which-the-state-court-considered-the- subject" language in Lindh and stating instead that the question of "unreasonable application" turns on "whether the

determination is at least minimally consistent with the facts and circumstances of the case"); Hall v. Washington, 106 F.3d 742, 748-49 (7th Cir.) ("The statutory 'unreasonableness' standard allows the state court's conclusion to stand if it is one of several equally plausible outcomes."), cert. denied, --- U.S. ----, 118 S.Ct. 264, 139 L.Ed.2d 190 (1997).

Since we heard oral argument in this case this Court, in Herbert v. Billy, 160 F.3d 1131, 1998 WL 801319 (6th Cir. Nov.20, 1998), has stated its agreement with the "reasonable jurist" approach taken by the Fifth Circuit in Drinkard, 97 F.3d at 769. Today we state as well our agreement with the standard enunciated by the First Circuit, namely, that "for the writ to issue, the state court decision must be so offensive to existing precedent, so devoid of record support, or so arbitrary, as to indicate that it is outside the universe of plausible, credible outcomes." O'Brien, 145 F.3d at 25; accord Hall, 106 F.3d at 748-49 ("The statutory 'unreasonableness' standard allows the state court's conclusion

to stand if it is one of several equally plausible outcomes."). We recognize that the First Circuit specifically rejected Drinkard 's "reasonable jurist" test when articulating its own standard, O'Brien, 145 F.3d at 25 n. 7. We think, however, that the two are not mutually exclusive; rather, both standards can be employed to aid in arriving at the correct answer to the question of "unreasonableness." The deference to the state courts' judgments required by the AEDPA is achieved by adopting the rule that the unreasonableness of a state court's application of clearly established Supreme Court precedent will not be "debatable among reasonable jurists," Drinkard, 97 F.3d at 769, if it is "so offensive to existing precedent, so devoid of record support, or so arbitrary, as to indicate that it is outside the universe of plausible, credible outcomes," O'Brien, 145 F.3d at 25.

II. PRE-TRIAL PUBLICITY

Petitioner argued that he should have received a change of venue due to pretrial publicity. The district court

agreed, first finding that "[t]he Supreme Court has established two standards to guide courts, the 'actual prejudice' standard and the 'presumed prejudice' standard," Nevers, 990 F.Supp. at 854, and second determining that the Michigan Court of Appeals [FN11] had unreasonably applied the "presumed prejudice" standard to Petitioner's case. It did not address the "actual prejudice" standard (the standard applied by the Michigan Court of Appeals) because it found the "presumed prejudice" standard dispositive. Id.

1. Clearly Established Supreme Court Precedent?

The first question that must be addressed is whether the distinction recognized by the district court as existing between presumptive and actual prejudice is "clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Review of relevant Supreme Court precedent indicates that there is such a distinction; it is best articulated by Murphy v. Florida, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975). Murphy

categorized the prejudice dealt with in the Court's previous cases, in which the Court "overturned a state-court conviction obtained in a trial atmosphere that had been utterly corrupted by press coverage," id. at 798, into two types--"actual" prejudice and "presumed" prejudice, both of which require reversal for refusal to change venue. Two years later these two distinct kinds of prejudice were specifically discussed in Dobbert v. Florida, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977), in which the Court wrote, "We concluded that the petitioner in Murphy had failed to show that the trial setting was inherently prejudicial or that the jury selection process permitted an inference of actual prejudice. 421 U.S., at 802, 95 S.Ct., at 2037." Dobbert, 432 U.S. at 303 (emphasis added).

"Trial Setting Inherently Prejudicial." One type of prejudice is represented by Rideau v. Louisiana, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963), Estes v. Texas, 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965), and

Sheppard v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966), in which the Court concluded that the "circumstances under which the trials ... were held" were such that inherent prejudice to the venire should be presumed. Murphy, 421 U.S. at 798-99. Rideau involved the televising of an in-jail 20 minute interrogation of the defendant by the police in which the defendant confessed to the murder for which he was subsequently convicted. The Court concluded that Rideau presumptively could not have received a fair trial in that parish "because it considered the trial under review 'but a hollow formality'--the real trial had occurred when tens of thousands [[FN12]] of people, in a community of 150,000, had seen and heard the defendant admit his guilt before the cameras." Id. at 799. "The trial in Estes had been conducted in a circus atmosphere, due in large part to the intrusions of the press, which was allowed to sit within the bar of the court and to overrun it with television equipment." Id. Sheppard contained "not only a background of extremely

inflammatory publicity but also a courthouse given over to accommodate the public appetite for carnival." Id. Regarding these latter two cases, the Court stated:

> The proceedings in these cases were entirely lacking in the solemnity and sobriety to which a defendant is entitled in a system that subscribes to any notion of fairness and rejects the verdict of a mob. They cannot be made to stand for the proposition that juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged alone presumptively deprives the defendant of due process.

Id.

"Jury Selection Process Permitted Inference of Actual Prejudice." The other type of prejudice, represented by Irvin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961), stands for the proposition that absent the "televised confession amounting to a trial" or "carnival atmosphere" situations, pretrial publicity that would inherently prejudice the jury pool can be discerned only by reviewing both the extent and nature of the publicity and the responses of the prospective jurors in voir dire. Irvin involved a capital case in which the defendant was tried in a small

community that was widely aware of his prior convictions, his confession to 24 burglaries and six murders (including the one for which he stood trial) and his unaccepted offer to plead guilty in order to avoid a death sentence. See Irvin, 366 U.S. at 725-28. In addition to this prejudicial information before the trial began eight of the 12 empaneled jurors had already formed the opinion that the defendant was guilty; some went "so far as to say that it would take evidence to overcome their belief" in the defendant's guilt. Id. at 728. Also, some 90% of the prospective jurors examined on the point indicated some degree of belief in the accused's guilt; for this reason 268 of the 430 veniremen were excused for cause. Id. at 727. The Murphy Court, after reviewing the facts of Irvin, noted, "In these circumstances, the [Irvin] Court readily found actual prejudice against the petitioner to a degree that rendered a fair trial impossible." Murphy, 421 U.S. at 798. The Court went on to observe:

> In a community where most veniremen will admit to a disqualifying prejudice, the reliability of the others'

> protestations may be drawn into question; for it is then more probable that they are part of a community deeply hostile to the accused, and more likely that they may unwittingly have been influenced by it.

Id. at 803. Comparing the facts in Murphy (petitioner claimed that the jury had learned of a prior conviction as well as certain facts about the crime at issue) to those in Irvin, the Murphy Court found no comparable community-based animus against Murphy, and thus affirmed the Court of Appeals' conclusion that the petitioner had not been denied his right to a fair trial.

Since Murphy, the Supreme Court has not applied the "trial setting inherently prejudicial" standard of Rideau, Estes, and Sheppard, presumably because the "televised interrogation/confession in a smaller community" and the "tabloid-esque, carnival atmosphere" instances have not arisen. We think that the holdings in those cases are, therefore, to be limited to their facts. The benchmarks for measuring pretrial publicity appear to be Irvin on the one end and Murphy on the other, as exemplified in Dobbert v.

Florida, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977), decided two years after Murphy. In Dobbert the petitioner, who was accused of murdering his children, pointed to extensive pretrial publicity surrounding his case. After discussing Murphy the Court concluded that Dobbert's case was more like Murphy than Irvin (the others were not even mentioned):

> Petitioner's argument that the extensive coverage by the media denied him a fair trial rests almost entirely upon the quantum of publicity which the events received. He has directed us to no specific portions of the record, in particular the voir dire examination of the jurors, which would require a finding of constitutional unfairness as to the method of jury selection or as to the character of the jurors actually selected. But under Murphy, extensive knowledge in the community of either the crimes or the putative criminal is not sufficient by itself to render a trial constitutionally unfair. Petitioner in this case has simply shown that the community was made well aware of the charges against him and asks us on that basis to presume unfairness of constitutional magnitude at his trial. This we will not do in the absence of a "trial atmosphere ... utterly corrupted by press coverage," Murphy v. Florida, supra, 421 U.S., at 798, 95 S.Ct., at 2035. One who is reasonably suspected of murdering his children cannot expect to remain anonymous. Petitioner has failed to convince us that under the "totality of the circumstances," Murphy, supra, the Florida Supreme Court was wrong in finding no constitutional violation with respect to the pretrial publicity.

Dobbert, 432 U.S. at 303.

Seven years after Dobbert the Court again addressed a "trial atmosphere utterly corrupted by press coverage" in Patton v. Yount, 467 U.S. 1025, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984), which involved a high school teacher accused of raping and murdering one of his female students. The Court discussed only Irvin, see id. at 1032-34, and Murphy, see id. at 1033-35, [FN13] in its review of the extent and nature of the pretrial publicity and the testimony of the jurors at voir dire. Concluding that "the jurors at Yount's trial had [not had] such fixed opinions that they could not judge impartially the guilt of the defendant," id. at 1035, the Court reversed the Fourth Circuit's grant of the writ.

Because we conclude that there is clearly established Supreme Court precedent distinguishing between cases involving presumed prejudice--when the "setting of the trial [is] inherently prejudicial," Murphy, 421 U.S. at 803--and actual prejudice--when review of both the jury voir dire

testimony and the extent and nature of the media coverage indicates "a fair trial [was] impossible," id. at 798--we turn to the question of whether the district court erred in determining that the Michigan Court of Appeals unreasonably applied "clearly established" precedent.

2. Unreasonable Application?

The Michigan Court of Appeals opinion states:

> Although this case involved extensive media publicity and expressions of community sentiment, all of the seated jurors indicated under oath that they could hear defendants' cases fairly and impartially, despite their exposure to media publicity and community sentiment. Thus, there is a presumption of impartiality which may be rebutted only by demonstrating facts sufficient to indicate actual opinion or bias on the part of seated jurors or by showing that the nature and extent of the media publicity and community sentiment was such that prejudice must be presumed. Murphy v. Florida, 421 U.S. 792, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975); People v. DeLisle, 202 Mich.App. 658, 509 N.W.2d 885 (1993).
>
> As in Murphy and DeLisle, less than one-third of the prospective jurors for these cases were disqualified on account of bias, and all the jurors chosen denied having fixed opinions as to defendants' guilt. Moreover, in Murphy and DeLisle, many or all of the seated jurors had prior knowledge of matters arguably more damaging to the defense than the content of the publicity surrounding these cases, such as facts regarding the accused's prior criminal record or pretrial confession to the charged offense.

> Admittedly, the instant cases are unique to the extent that jurors were exposed to predictions or concerns that local rioting may occur in the event of acquittal, as had previously occurred in Los Angeles when police officers were acquitted of state charges in the Rodney King beating case. However, we do not find this sufficient to establish presumptive prejudice. As for defendants' claims of actual juror bias or prejudice based upon certain selected responses given on voir dire, we find that the jurors' remarks, when viewed in full context, do not indicate partiality, fixed opinion, or inability to decide the case solely on the evidence presented.

People v. Budzyn, Nos. 170477, 170478, slip op. at 6- 7 (Mich.Ct.App. March 22, 1995) (unpublished per curiam).

The district court found that the Michigan court's decision was an unreasonable application of clearly established Supreme Court precedent because it "failed to address the presumed prejudice standard of Rideau and Murphy, [and] ... instead relied upon juror statements that they will be impartial," Nevers, 990 F.Supp. at 864. In particular the district court relied on Rideau, see Nevers, 990 F.Supp. at 854. Rideau, however, is not applicable to this case because Rideau is limited to its facts: a televised jail-house interrogation of a defendant, in which he confessed to

a robbery/kidnapping/murder that he had committed only the previous night, seen by over one-third of the community's residents two weeks before his arraignment, Rideau, 373 U.S. at 724, and less than two months before his trial, id. at 729 (Clark, J., dissenting). As a result, the trial was but a "hollow formality" because Rideau's "real trial" had occurred when those in the community watched the televised interrogation and heard him admit his guilt. Murphy, 421 U.S. at 799. Rideau must be understood as limited to its facts because the Supreme Court has not discussed it in a pretrial publicity case since Murphy, and even in Murphy it was discussed strictly on its facts. [FN14] In the case before us, the only thing close to a pretrial admission by Nevers appears in an article published two days after the incident (and seven months before his trial) in which Nevers is quoted as saying, "I must have done something wrong, a guy died." Nevers, 990 F.Supp. at 855. This is hardly the equivalent of a televised confession to murder.

Neither do the facts of this case evince the carnival atmosphere at issue in Sheppard and Estes. To be sure, there was extensive media coverage in the case before us, [FN15] most of which was newspaper rather than television, Nevers, 990 F.Supp. at 855, and which we discuss more extensively infra. The content and extent of the newspaper articles in this case are similar to, but much milder than, those found in Sheppard. Sheppard, however, involved out-of-control television coverage both before [FN16] and during the trial that makes the media hype surrounding the O.J. Simpson trial appear tame, and, as the Court noted in Murphy, it is this television circus, in addition to the newspaper coverage, for which Sheppard is significant.

> Sheppard arose from a trial infected not only by a background of extremely inflammatory publicity but also by a courthouse given over to accommodate the public appetite for carnival. The proceedings in ... [Sheppard and Estes] were entirely lacking in the solemnity and sobriety to which a defendant is entitled in a system that subscribes to any notion of fairness and rejects the verdict of a mob.
> Murphy, 421 U.S. at 799. [FN17]

Because this case did not involve a televised

confession as in Rideau or the carnival atmosphere displayed in Estes and Sheppard, the clearly established law we must apply here is that of Irvin, where the question was whether "adverse pretrial publicity ... create[d] such a presumption of prejudice in a community that the jurors' claims that they can be impartial should not be believed." Patton, 467 U.S. at 1031 (discussing Irvin). The analysis under Irvin differs from that under Rideau, Estes, and Sheppard, in that we must review not only the media coverage itself but the substance of the jurors' statements at voir dire in determining whether there was a "community-wide sentiment" against the defendant.

To be sure, there were many in the community enraged by the beating death of Malice Green, as shown by the several newspaper articles and editorials contained in the record and discussed thoroughly in the district court's opinion. See Nevers, 990 F.Supp. at 855-63. [FN18] The district court's opinion correctly summarizes the most problematic examples of the pretrial publicity, see Nevers,

990 F.Supp. at 862-64: prejudicial statements to the media by the mayor and police chief, especially the statement by the mayor to NBC Nightly News, "A young man who was under arrest was literally murdered by police;" the rapid settlement by the city of a civil suit lodged by Green's family for over $5 million; the reports of riot preparation by the Detroit Police Department in the event of an acquittal; and the widely publicized facts concerning Nevers's reputation as a violent rogue cop, his involvement in the shooting deaths of previous suspects, the brutality complaints filed against him, and his former involvement in STRESS, [FN19] id. at 863.

However, while the information contained in the media coverage was certainly prejudicial, it was not nearly so prejudicial as that found in Irvin, in which the

> barrage of newspaper headlines, articles, cartoons and pictures ... unleashed against ... [the defendant] during the six or seven months preceding his trial ... announced his confession to the six murders and the fact of his indictment for four of them in Indiana[;] ... [his] offer to plead guilty if promised a 99-years sentence, but also the determination, on the part of the prosecutor to secure the death penalty[;] and ... [his] confess[ion] to 24 burglaries (the modus

> operandi of these robberies was compared to that of the murders and the similarity noted). One story ... characterized petitioner as remorseless and without conscience but also as having been found sane by a court-appointed panel of doctors. In many of the stories petitioner was described as the "confessed slayer of six," a parole violator and fraudulent- check artist.... On the day before the trial the newspapers carried the story that Irvin had orally admitted the murder of Kerr (the victim in this case) as well as the "robbery-murder of Mrs. Mary Holland; the murder of Mrs. Wilhelmina Sailer in Posey County, and the slaughter of three members of the Duncan family in Henderson County, Ky."

Irvin, 366 U.S. at 725-26.

More importantly, Irvin discussed information regarding the jury panel which the Murphy Court found extremely important. As noted previously, in Irvin "90% of those examined on the point ... entertained some opinion as to guilt--ranging in intensity from mere suspicion to absolute certainty." Id. at 727. "[E]ight of the 12 [empaneled] jurors had formed an opinion that the defendant was guilty before the trial began; some went 'so far as to say that it would take evidence to overcome their belief' in [the petitioner's] guilt." Murphy, 421 U.S. at 798. "The panel consisted of 430 persons[, and] [t]he court itself excused 268 of those on

challenges for cause as having fixed opinions as to the guilt of the petitioner...." Irvin, 366 U.S. at 727. The Murphy Court, after noting these facts, stated:

> In the present case, by contrast, 20 of the 78 persons questioned were excused because they indicated an opinion as to petitioner's guilt. This may indeed be 20 more than would occur in the trial of a totally obscure person, but it by no means suggests a community with sentiment so poisoned against petitioner as to impeach the indifference of jurors who displayed no animus of their own.

Murphy, 421 U.S. at 803 (footnote omitted).

In the case before us, the Appellant's Brief states, without citation to the record, that of the 105 prospective jurors dismissed, only 15 were dismissed for expressing bias, (Appellant's Br. at 25 n. 5), a fact not contested in Appellee's Brief or at oral argument. Also, it appears certain that all potential jurors had heard about the case, as the prosecutor conceded as much during voir dire, see J.A. at 502 (Voir Dire Tr.); but this, of course, is not enough to justify a change of venue, as even the "existence of a [ ] preconceived notion as to the guilt or innocence of an accused, without more, is [not] sufficient to rebut the presumption of a prospective juror's

impartiality," Irvin, 366 U.S. at 723.

The Joint Appendix submitted on appeal contains almost 500 pages of jury voir dire, which, in the main, is the voir dire testimony of the empaneled jurors, with scatterings of excerpts from the voir dire testimony of other potential jurors who did not become members of the panel. We attach as an appendix a summary of our review of these pages of the transcript.

Our extensive review of the transcript of the jury voir dire leads us to conclude that none of the jurors actually empaneled had any fixed opinion as to Nevers's guilt before the trial began, in contrast to the situation in Irvin, where eight of the twelve jurors had such opinions. These transcript pages disclose only two jurors eventually seated who were challenged for cause, only as to one of those, namely Juror # 5, does the trial court's denial of the challenge for cause appear to have been questionable. Cf. Beck v. Washington, 369 U.S. 541, 557-58, 82 S.Ct. 955, 8 L.Ed.2d 98 (1962)

("The fact that petitioner did not challenge for cause any of the jurors so selected is strong evidence that he was convinced the jurors were not biased and had not formed any opinions as to his guilt."). As for the jurors' statements about "community sentiment" and the opinions of their friends and co-workers, the voir dire transcript indicates that there were many in Detroit who had the opinion that Nevers likely was not guilty, although those believing Nevers guilty were the most vocal and were probably in the majority. It appears, however, that those jurors who were actually empaneled took seriously the obligation they were about to undertake and did not have preformulated opinions as to Nevers's guilt. Cf. Gentile v. State Bar of Nevada, 501 U.S. 1030, 1054-55, 111 S.Ct. 2720, 115 L.Ed.2d 888 (1991) (involving an attorney's ability to speak about a trial to the media and stating, "Only the occasional case presents a danger of prejudice from pretrial publicity. Empirical research suggests that in the few instances when jurors have been exposed to extensive and

prejudicial publicity, they are able to disregard it and base their verdict upon the evidence presented in court.") (citing law review articles). It also appears, however, that the news media was, in a layman's eyes, painting Nevers as guilty, and that at least one juror was concerned about having his name publicly disclosed for fear of harassment by the extremists on the side adversely affected by the jury's verdict.

While this certainly is not a clear-cut case, we are unable to say, after carefully reviewing the voluminous Joint Appendix submitted by the parties, that these facts place this case in the same league as Irvin in terms of community bias and actual prejudice. And this is a federal habeas action, in which we must review the decisions of the state courts under the deferential standard imposed by the AEDPA. Even if we would reach a different conclusion if this case were before us on direct appeal from a criminal trial in a federal district court, we are unable to say that the Michigan Court of Appeals's application of Supreme Court precedent resulted in

a decision whose unreasonableness "could not be debatable among reasonable jurists," Drinkard, 97 F.3d at 769, because it is "so offensive to existing precedent, so devoid of record support, or so arbitrary, as to indicate that it is outside the universe of plausible, credible outcomes," O'Brien, 145 F.3d at 25. Accordingly, because we cannot say that the Michigan Court of Appeals's decision "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), we hold that the district court erred in granting the writ on this issue.

III. EXTRANEOUS INFLUENCES ON THE JURY

Nevers and Budzyn claimed in their appeals before the Michigan appellate courts that extraneous influences on the jury deprived them of fair trials. The Michigan Supreme Court, citing Hughes v. Borg, 898 F.2d 695, 700 (9th Cir.1990), and other Ninth Circuit precedent, articulated the

following test for considering their allegations:

> In order to establish that the extrinsic influence was error requiring reversal, the defendant must initially prove two points. First, the defendant must prove that the jury was exposed to extraneous influences. Second, the defendant must establish that these extraneous influences created a real and substantial possibility that they could have affected the jury's verdict. Generally, in proving this second point, the defendant will demonstrate that the extraneous influence is substantially related to a material aspect of the case and that there is a direct connection between the extrinsic material and the adverse verdict. If the defendant establishes this initial burden, the burden shifts to the people to demonstrate that the error was harmless beyond a reasonable doubt. We examine the error to determine if it is harmless beyond a reasonable doubt because the error is constitutional in nature. The people may do so by proving that either the extraneous influence was duplicative of evidence produced at trial or the evidence of guilt was overwhelming.

Budzyn, 566 N.W.2d at 235 (citations and footnotes omitted).

The court then noted that Budzyn and Nevers had submitted four affidavits from jurors, three of whom had sat on Nevers's jury and one of whom had sat on Budzyn's, as proof. After determining that three of the affidavits were admissible evidence available for their consideration, [FN20] the court concluded that during the trial, three extraneous matters had

reached some of the jurors or the jury as a whole, namely: (1) the jury had viewed (at least in part) the film "Malcolm X"; (2) a member of Nevers's jury had learned from news reports about the city's preparing for a potential riot in the event of an acquittal; and (3) the jurors had been exposed to and allegedly had considered the supposed fact that Nevers and Budzyn had been members of STRESS. In a footnote, the court noted that the trial court had denied a request from Budzyn and Nevers for an evidentiary hearing regarding these affidavits, and instead had accepted as true that the extraneous information had come into the jury's possession and had been considered. Because the court explicitly found a real and substantial possibility that these matters could have influenced the juries' verdicts, see 566 N.W.2d at 236-40, it conducted a harmless error review. The court concluded that the extraneous matters were harmless as to Nevers because of the strength of the evidence against him, namely the consistency and credibility of the EMS workers' testimonies,

id. at 240-41, but that the extraneous matters were not harmless as to Budzyn because the testimony of the civilian witnesses was not as credible, did not conclusively show him striking Green on the head, and was conflicting. See id. at 241-43.

On habeas review, the district court agreed with the Michigan Supreme Court that the jury's receipt of the extraneous information amounted to constitutional error. Nevers, 990 F.Supp. at 867. The district court then determined that the error was "trial error," rather than "structural error." In reaching this conclusion, the district court noted that the Supreme Court has found "structural errors" in only limited circumstances, see Nevers, 990 F.Supp. at 867 (citing Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) (total deprivation of the right to counsel); Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927) (lack of impartial trial judge); Vasquez v. Hillery, 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598

(1986) (unlawful exclusion of grand jurors of defendant's race); McKaskle v. Wiggins, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984) (the right to self representation at trial); Waller v. Georgia, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984) (right to public trial); Sullivan v. Louisiana, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993) (erroneous reasonable doubt instruction)); the extrinsic information reached the jury only after the trial had begun rather than permeating the entire process and thus was more closely akin to errors which occurred during the presentation of the case to the jury, see id. at 868; and prior Supreme Court extraneous jury influence cases have treated the issue as subject to harmless error review, see id. (citing Smith v. Phillips, 455 U.S. 209, 217, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982); Remmer v. United States, 347 U.S. 227, 229, 74 S.Ct. 450, 98 L.Ed. 654 (1954)). Finally, the district court concluded that because the error was of the "trial" and not the "structural" variety, it was subject to "harmless error"

analysis. See generally Brecht v. Abrahamson, 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993).

Whether Nevers has shown that he is entitled under § 2254(d) to issuance of the writ on his claim of jury taint appears to us to have two separate aspects. The first and obvious aspect is his claim that the Michigan Supreme Court's application of harmless error precedent was unreasonable. The second aspect, less obvious but clearly implied from the first, is the claim that the state courts' failure to conduct any inquiry into the actual effect of the extraneous information the jury acquired resulted in a decision that was contrary to clearly established law. It may be that Nevers has waived his right to argue this second claim, since the state courts' opinions do not squarely address this issue and it was not explicitly raised in the habeas petition or before us on appeal. Our review of this case, however, persuades us that where the state court has expressly ruled in a manner that prevents a defendant in a criminal proceeding from having

the opportunity to obtain the information he must have to pursue a claim of constitutional error, whether that ruling was contrary to law is inextricable from the question of whether the constitutional error was harmless. Accordingly, we will address both aspects of Nevers's claim of jury taint.

We agree with the district court--for the reasons mentioned by that court--that Nevers's claim that the jury was influenced by extraneous information was amenable to harmless error analysis. Additionally, we note that at least four other circuit courts have found extrinsic juror influence claims to be subject to "harmless error" analysis. E.g., Pyles v. Johnson, 136 F.3d 986, 993 (5th Cir.), cert. denied, --- U.S. ----, 118 S.Ct. 2338, 141 L.Ed.2d 707 (1998); Jeffries v. Wood, 114 F.3d 1484, 1489 (9th Cir.), cert. denied, --- U.S. ----, 118 S.Ct. 586, 139 L.Ed.2d 423 (1997); Sherman v. Smith, 89 F.3d 1134, 1137 (4th Cir.1996), cert. denied, 519 U.S. 1091, 117 S.Ct. 765, 136 L.Ed.2d 712 (1997); Bibbins v. Dalsheim, 21 F.3d 13, 16 (2d Cir.) (per curiam), cert.

denied sub nom., Bibbins v. New York, 513 U.S. 901, 115 S.Ct. 261, 130 L.Ed.2d 181 (1994).

We must therefore determine what standard we must use in reviewing the Michigan Supreme Court's application of harmless error review. Pre-AEDPA Supreme Court precedent originally held that constitutional errors occurring in the state trial court require reversal unless the government could prove the error "harmless beyond a reasonable doubt." See generally Chapman v. California, 386 U S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). In 1993 the Supreme Court in Brecht v. Abrahamson specifically held that Chapman no longer applied to federal habeas review of state court harmless error decisions, although state courts would still be required to apply that standard on direct review. Instead, on habeas review, federal courts were to grant the writ where constitutional "trial" errors, as opposed to "structural" errors not amenable to harmless error review, were demonstrated to have " 'had substantial and injurious

effect or influence in determining the jury's verdict.' " Brecht, 507 U.S. at 638 (quoting Kotteakos v. United States, 328 U.S. 750, 776, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946)). The Brecht standard was further qualified in O'Neal v. McAninch, 513 U.S. 432, 115 S.Ct. 992, 130 L.Ed.2d 947 (1995), which held that "where the record is so evenly balanced [on the issue of whether the error had a substantial and injurious effect] that a conscientious judge is in grave doubt as to the harmlessness of an error," id. at 437, "the petitioner must win," id. at 436. Thus, until the AEDPA the "substantial and injurious effect" test governed habeas review of constitutional "trial-type" errors.

The AEDPA, however, amended § 2254(d) to decree that the writ shall not issue unless the state court's affirmance of the conviction amounted to an "unreasonable application" of clearly established Supreme Court precedent. On direct review, the state appellate court would determine whether the claimed error was harmless under Chapman 's

"unreasonable beyond a reasonable doubt" standard. [FN21] The question federal habeas courts must now address when assessing the harmlessness of constitutional error is what the standard is for determining whether the state court's decision resulted from an "unreasonable application" of Chapman.

The district court, recognizing the conundrum, reviewed the Michigan Supreme Court's determination under both the Chapman and the Brecht /O'Neal standards and found both that the extraneous information had a substantial and injurious effect on the jury's verdict, and that the Michigan Supreme Court had unreasonably applied Supreme Court precedent by concluding that the error had been harmless. One month after the district court issued its opinion in this case, a different judge of the Eastern District of Michigan concluded that the AEDPA had abrogated the Brecht /O'Neal standard and required the habeas court to assess whether the state court's application of the Chapman standard was unreasonable. See Barker v. Yukins, 993

F.Supp. 592, 602 n. 7 (E.D.Mich.1998). We have found no opinions from our sister circuits addressing the appropriate standard to now apply when faced with this question. [FN22] Accordingly, we write on a clean slate.

The clear language of § 2254(d) permits us to review the Michigan Supreme Court's adjudication of harmless error only to determine whether it is contrary to or resulted from an unreasonable application of clearly established federal law--specifically, the harmless error standard of Chapman v. California. [FN23] The threshhold question confronting us is how we are to make that determination. We think that the amendments to § 2254(d) do not vitiate in any way the premise set out in Brecht v. Abrahamson, that

> [s]tate courts are fully qualified to identify constitutional error and evaluate its prejudicial effect on the trial process under Chapman, and state courts often occupy a superior vantage point from which to evaluate the effect of trial error. For these reasons, it scarcely seems logical to require federal habeas courts to engage in the identical approach to harmless-error review that Chapman requires state courts to engage in on direct review.

Brecht, 507 U.S. at 636 (internal citations omitted). As the Court pointed out, if federal habeas courts are required simply to apply a Chapman analysis, the result will be to overturn convictions because there is a "reasonable possibility" that trial error contributed to the verdict, a result at odds with the historic meaning of habeas corpus, which is to afford relief to those whom society has "grievously wronged." Id. at 637.

We have already explained that under the highly deferential standard of AEDPA we may not find the state court's application of federal law unreasonable unless reasonable jurists would find it so arbitrary, unsupported or offensive to existing precedent as to be outside the realm of plausible credible outcomes. We think that when the issue before the federal habeas court is the state court's finding of harmless error, the test set out by the Supreme Court in Kotteakos and explicitly reiterated in Brecht quite precisely captures Congress's intent as expressed in AEDPA and,

therefore, continues to be applicable. That test is whether the error " 'had substantial and injurious effect or influence in determining the jury's verdict,' " Brecht, 507 U.S. at 637; it is the habeas petitioner's burden to demonstrate that the trial error resulted in "actual prejudice." Id. If the petitioner is able to make that showing, he will surely have demonstrated that the state court's finding that the error was harmless beyond a reasonable doubt--the Chapman standard--was outside the realm of plausible credible outcomes, and therefore resulted from an unreasonable application of Chapman.

The Michigan Supreme Court held that the jury's possession of extraneous information was constitutional error amenable to harmless error analysis. Further, the court conceded that there was "a real and substantial possibility that these external influences together could have affected the juries' verdicts." The court then conducted a harmless error analysis to determine whether the error was harmless beyond a reasonable doubt, which, the court said, the state could

demonstrate by "proving that either the extraneous influence was duplicative of evidence produced at trial or the evidence of guilt was overwhelming." Budzyn, 566 N.W.2d at 235 (citing Hughes v. Borg, 898 F.2d 695, 700 (9th Cir.1990)). [FN24] The court concluded:

> In the Nevers' trial, the four EMS witnesses, who had no apparent motive to lie, provided interlocking testimony that Nevers repeatedly bludgeoned Malice Green in the head with his heavy police flashlight while Green was dazed and not offering significant resistance. The medical testimony of the injuries to Green's head also substantiated this testimony. The people have proven that there was unimpeachable, compelling evidence that Nevers harbored, at the very least, an unjustified intent to commit great bodily harm against Green. Thus, under Hughes, the extraneous influences were harmless.

Id. at 240-41 (footnote omitted).

We agree with the district court that the Michigan Supreme Court applied the Chapman "harmless beyond a reasonable doubt" test. We must therefore determine whether the district court was correct in holding that the application of that test was unreasonable.

The issue at the heart of Nevers's prosecution was

not what Nevers did, but why he did it. As the Michigan Supreme Court said, the cumlative evidence that Nevers beat Malice Green was overwhelming; it is virtually undisputed that blows to the head were a cause of Green's death; and Nevers admitted striking many of those blows. But Nevers's defense centered around his contention that the blows he struck were intended solely to subdue Green, to prevent him from grabbing Nevers's gun, to protect himself from Green, and to force Green to relinquish the object he clutched in his hand, which Nevers claimed to have thought was something sharp and perhaps useable as a weapon. Nevers, in short, claimed that he used force only in response to Green's refusal to submit to the police and that the force he used was only that necessary to protect himself and subdue Green.

It was the province of the jury alone to determine Nevers's credibility and the veracity of his testimony. The extraneous information that the jury was exposed to during the course of the trial, and particularly the information

regarding STRESS, unquestionably had the potential for influencing how the jury viewed Nevers's testimony about his motivation for beating Green, and the Michigan Supreme Court acknowledged as much. The Michigan court, however, went on to conclude that in light of the evidence against Nevers, including evidence the court labeled as "unimpeachable" regarding his motives, the extraneous influences were harmless beyond a reasonable doubt.

We cannot conclude that the Michigan court's application of the Chapman "harmless beyond a reasonable doubt" test was reasonable. Chapman explicitly includes the Fahy "reasonable possibility that the ... [error] complained of might have contributed to the conviction" test. Chapman, 386 U.S. at 24 (internal quotation marks omitted). The Michigan Supreme Court characterized the extraneous information regarding Nevers's supposed membership in STRESS as

> the kind of concrete, factual evidence that could substantially compromise the ability of a jury to issue a fair verdict because the evidence relates directly to the past conduct of the police officers ... It suggests ... that these

> officers may have been acting in accordance with their preexisting racist predisposition to target young black men for abuse when they encountered Malice Green. This evidence was never introduced at trial. It is the kind of evidence that has a direct and rational connection between it and an adverse verdict.

Budzyn, 566 N.W.2d 239 (first emphasis in the original, second emphasis added) (footnote omitted). Of particular significance in this case is the fact that even though the affidavits containing the extraneous information included at least one juror's statement that the STRESS information "set the tone" for the jury's deliberations, the trial court accepted as true the substance of those affidavits and denied Nevers's request for an evidentiary hearing with regard to them. The Michigan Supreme Court similarly accepted the affidavits. In the absence of any evidence or findings of fact regarding whether or how the extraneous information actually affected or influenced the members of the jury, and conceding that there was a "real and substantial possibility" that the extraneous material introduced into the jury room may have affected the jury's verdict, the Michigan Supreme Court

nonetheless concluded that because the evidence of Nevers's "unjustified intent to commit great bodily harm against Green" was "unimpeachable," extraneous and prejudicial information reinforcing the evidence of wrongful intent, was harmless. But the evidence of wrongful intent was "unimpeachable" only if the jury chose not to credit Nevers's testimony. We think that under these circumstances, Nevers need point to nothing more than the juror's sworn statement that the STRESS information set the tone for the jury's deliberations and the Michigan Supreme Court's acknowledgment that this was the kind of material that "has a direct and rational connection between it and an adverse verdict" to demonstrate that the jury's possession of the extraneous information " 'had [a] substantial and injurious effect or influence in determining the jury's verdict,' " Brecht, 507 U.S. at 637, and resulted in actual prejudice. Id. We conclude that it would not be debatable among reasonable jurists that the Michigan Supreme Court's finding of harmless

error is so arbitrary, unsupported and offensive to existing precedent as to be outside the realm of plausible credible outcomes. Accordingly, we hold that the district court's granting of the writ on this ground is affirmed.

Finally, had the trial court undertaken to investigate the claim of extraneous jury influence, Nevers might not have been able to claim constitutional error at all. It is a matter of clearly established Supreme Court precedent that a criminal defendant claiming implied juror bias is entitled to the opportunity to prove actual bias. See Dennis v. United States, 339 U.S. 162, 171-72, 70 S.Ct. 519, 94 L.Ed. 734 (1950) ("Preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury."). When a trial court is presented with evidence that an extrinsic influence has reached the jury which has a reasonable potential for tainting that jury, due process requires that the trial court take steps to determine what the effect of such extraneous information actually was on that jury. In Smith v.

Phillips, 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982), the Supreme Court made it clear that, while no court has the ability to shield jurors from every outside contact or influence that might affect their votes, nonetheless, the trial court has a duty to take steps to ensure that the jury votes solely on the basis of the evidence presented at trial. "Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." Id. at 217. The Court went on to hold that a post-trial hearing is sufficient to decide juror partiality in both the state and federal courts, and that in a federal habeas proceeding, the factual finding made by the state trial court in such a hearing is entitled to the presumption of correctness. Id. at 218.

In Nevers's case, the state trial court accepted as true the affidavits presented by Nevers and Budzyn detailing the extraneous information that had come into the jury's

possession; however, the court denied their request for an evidentiary hearing and made no attempt to determine what effect that information actually had on the jury's verdict. Clearly the failure of the trial court to make such a factual determination does not comport with due process, since, in the absence of any findings of fact with regard to whether or to what extent the jury's verdict was actually influenced by the extraneous information, Nevers had no specific facts with which to support his claim that the jury did not decide the case solely on the evidence properly before it.

The Michigan Supreme Court did not address the failure of the trial court to accord Nevers his due process right to have a factual determination made regarding the effect of the extraneous information on the jury's deliberations, proceeding instead, as we have heretofore discussed, to its determination that the jury's possession of the extraneous material was harmless beyond a reasonable doubt when weighed against the evidence of Nevers's guilt. To the

extent that we understand the distinction between a state court decision that is "contrary to" established Supreme Court precedent and one that involves an "unreasonable application of" such precedent, we think that the Michigan Supreme Court's failure even to consider the trial court's refusal to permit Nevers any opportunity to establish actual jury bias resulted in a decision contrary to established law. This is not a case such as Dennis, 339 U.S. 162, 70 S.Ct. 519, 94 L.Ed. 734, or Chandler v. Florida, 449 U.S. 560, 101 S.Ct. 802, 66 L.Ed.2d 740 (1981), in which the Court refused to set aside the defendant's conviction because the defendant made no attempt to demonstrate with specificity the "impaired ability of the jurors to decide the case on only the evidence before them," id. at 581. Here Nevers asked for but was denied an evidentiary hearing on his claim of jury bias, and was thus effectively prevented from demonstrating with specificity that the extraneous information the jury possessed did in fact impair the ability of the jury to decide the case solely on the

evidence properly presented to them through the mechanism of the trial. Whether we look at the failure of the Michigan courts to accord Nevers the requested hearing on his jury bias claim as an instance of the state courts' failing to apply the correct legal principals as enunciated by the Supreme Court, see Neelley v. Nagle, 138 F.3d at 923, or an instance of the state courts' issuing decisions squarely in conflict with a Supreme Court precedent, see Green v. French, 143 F.3d at 870, or an instance of the state courts' ruling in a manner contrary to a specific Supreme Court rule that governs the habeas petitioner's claim, see O'Brien v. Dubois, 145 F.3d at 24, we must conclude that the result of the state courts' proceedings is contrary to clearly established federal law as determined by the Supreme Court. [FN25]

Because we conclude that the Michigan Supreme Court's decision with regard to the claim of extraneous jury influence was both contrary to and resulted from an unreasonable application of clearly established Supreme

Court precedent, we AFFIRM the judgment of the district court granting the writ on this issue.

CONCLUSION

For the foregoing reasons, we hold that the district court erred in concluding that the petition for a writ of habeas corpus should be granted on the claim that Nevers was denied a fair trial because of pretrial publicity. We hold further that the district court correctly concluded that the petition for a writ of habeas corpus should be granted on the claim that Nevers was denied a fair trial because of extraneous influences on the jury. Accordingly, we AFFIRM the judgment of the district court granting the petition for a writ of habeas corpus.

APPENDIX
SUMMARY OF JURY VOIR DIRE

Juror # 1 acknowledged that his neighbors, with whom he had talked about the case before he was called for jury duty, thought Nevers guilty and wanted him convicted, J.A. at 467 (Voir Dire Tr.). However, Juror # 1 also

specifically stated that he had not formed any opinions concerning Mr. Nevers, J.A. at 473 (Voir Dire Tr.), and that, although he had read about the case, he questioned the veracity of what he had read "because the papers write anything, the news say [sic] anything, so its hard to believe," J.A. at 464 (Voir Dire Tr.). Juror # 1 was passed for cause by defense counsel. J.A. at 475 (Voir Dire Tr.).

Juror # 3 acknowledged that he was aware of Malice Green's death through the newspaper and television. J.A. at 477 (Voir Dire Tr.). Juror # 3 stated that from the "things stated in the media ... everybody seemed to have an opinion," J.A. at 481 (Voir Dire Tr.), but also said, "After the initial hype of the incident was over, then it just kind of quieted down. I didn't really think about it anymore." J.A. at 486 (Voir Dire Tr.). Juror # 3 admitted that he had discussed the case with his professional colleagues of various races when it first occurred, which included comparison of it to the Rodney King beating, but said that the discussion turned to

violence in general, rather than this specific incident. J.A. at 493-98 (Voir Dire Tr.). Juror # 3 specifically stated that he had formed no opinion on guilt or innocence, and had no opinion as to whether the encounter between Green and Nevers was "proper" or "improper." J.A. at 499-500 (Voir Dire Tr.). Defense counsel's challenge for cause of Juror # 3, an African-American, was denied.

Juror # 5 acknowledged that he had heard about the case from the television and newspapers. J.A. at 508-09, 531 (Voir Dire Tr.). He said that when he learned about the case the first question in his mind concerned what Malice Green had been doing to deserve being stopped by the police. J.A. at 510-11 (Voir Dire Tr.). He also wondered why it had taken "three officers to bring down one person," J.A. at 512 (Voir Dire Tr.), and stated that he was bothered by this fact because it should not have taken that many police officers, which he thought was "too many," J.A. at 514 (Voir Dire Tr.), to subdue Green, J.A. at 513 (Voir Dire Tr.). Juror # 5 further

stated that from these concerns, he had formed an opinion that "something wrong" had occurred at the scene, but did not know whether it had been Green or the police officers that had been its cause, J.A. at 515, 516 (Voir Dire Tr.). He also repeatedly acknowledged that it was his "opinion that if Malice Green didn't commit a crime out there, that Mr. Nevers or one of those other defendants did." J.A. at 517, 520, 522 (Voir Dire Tr.). He acknowledged that based on what he had heard and read about the incident, he had made some fairly firm determinations concerning what had occurred and that he would be surprised if Defense counsel did not put on evidence showing that Malice Green had done something wrong. J.A. at 525-26 (Voir Dire Tr.). He then stated, however, that he could put all of that out of his mind and look only at the evidence presented at trial. J.A. at 526-28. Finally, he acknowledged that based on what he had read and seen on T.V., he believed that Mr. Nevers or one of the other officers had caused Malice Green's death, but that he

did not have an opinion as to how it happened, that is, whether it was murder. J.A. at 533-34. Defense counsel's challenge for cause of Juror # 5 was denied. J.A. at 540-46 (Voir Dire Tr.).

Juror # 15 stated that had no preconceived ideas as to Nevers's guilt, J.A. at 562 (Voir Dire Tr.), and acknowledged that Mr. Nevers "sits there in [her] eyes innocent." J.A. at 564 (Voir Dire Tr.). It does not appear from the transcript pages included in the Joint Appendix that Juror # 15 was challenged for cause.

Juror # 10 acknowledged that she believed one of the three defendants, or maybe all three, were guilty, but had no opinion as to Mr. Nevers's guilt or innocence at that time. J.A. at 588-91 (Voir Dire Tr.). Definitely, however, she felt that of the three standing trial, "somebody is guilty of something." J.A. at 591 (Voir Dire Tr.). Later on in her voir dire testimony she acknowledged that she believed that Mr. Green died "because of a senseless act by somebody." J.A. at

601-02 (Voir Dire Tr.). She stated that she sympathized with Green and his family, but that she also sympathized equally with Nevers and his family. See J.A. at 606-07 (Voir Dire Tr.). It does not appear from the Joint Appendix that the Defense sought to have Juror # 10 struck for cause.

Juror # 13, who was passed for cause, stated she had no opinion as to guilt or innocence, J.A. at 619, 626 (Voir Dire Tr.), and specifically disagreed with Juror # 10 that one of the defendants had to be guilty of something, J.A. at 619 (Voir Dire Tr.).

Juror # 9 specifically stated that he had no opinion as to guilt or innocence, and that he did not form an opinion from the media coverage because he felt as if the "whole story" had not been told yet. J.A. at 649 (Voir Dire Tr.) He had not had any discussions with friends or co-workers about the case, other than briefly mentioning it to his girlfriend. J.A. at 648 (Voir Dire Tr.). Juror # 9 was very worried about having his identity disclosed in the media after the trial was

over. See J.A. at 641-43, 658-62, 664 (Voir Dire Tr.). He was worried about being harassed by either the group protesting outside of the courthouse during voir dire or by police officers, depending upon how the verdict came out. J.A. at 661-62 (Voir Dire Tr.). He said, however, that his concern would not affect his ability to render a decision, and that if asked for a verdict right then it would have been not guilty. J.A. at 662-63 (Voir Dire Tr.). He was passed for cause. J.A. at 657, 675 (Voir Dire Tr.).

Juror # 14 specifically stated that he had not formed any opinions about what had occurred in this case because he was not very familiar with the case. J.A. at 695 (Voir Dire Tr.). He was passed for cause. J.A. at 688, 702 (Voir Dire Tr.).

Juror # 4 had heard about the case from "some rumblings in the neighborhood," but not from newspaper or T.V., which he neither read nor watched. J.A. at 707- 08 (Voir Dire Tr.). He repeatedly said that he had no opinions on

the case whatsoever, J.A. at 704, 708 (Voir Dire Tr.), and that if pressed to make a decision he would have to find Nevers not guilty because he had not heard any evidence, J.A. at 709 (Voir Dire Tr.). He was passed for cause. J.A. at 722, 725 (Voir Dire Tr.).

Juror # 16 admitted that he had heard about the case and had discussed it with his friends, whose opinions had varied from guilty to not guilty. J.A. at 736-37 (Voir Dire Tr.). He then stated that his personal opinion was that, from the facts presented in the media, Nevers was not guilty. J.A. at 737, 738 (Voir Dire Tr.). Juror # 16 was passed for cause. J.A. at 745, 751 (Voir Dire Tr.).

Juror # 12 stated that she had heard about the case through the T.V. and radio, but had not read about it. J.A. at 763 (Voir Dire Tr.). When asked what she thought about the case when she learned of it, she replied, "I thought that when the point came for a trial that it was going to be very, very

grave because people would really need to hear the facts to make sure it was a fair trial and not based on emotion or public opinion." J.A. at 769 (Voir Dire Tr.). From the remarks she had heard she believed public opinion was divided. J.A. at 769-70 (Voir Dire Tr.). She stated that she had not formed an opinion, and wanted to wait to do so until the facts came out at trial. J.A. at 771, 776 (Voir Dire Tr.). She was passed for cause. J.A. at 781, 794 (Voir Dire Tr.).

Juror # 2 stated that she had heard about the incident before reporting for jury duty, and that she had heard that Green "had died as a result of a beating from the officer." J.A. at 810 (Voir Dire Tr.). She also acknowledged having heard the Mayor's comment that the police officers were "murderers," but stated that she thought the Mayor had gone "overboard," had "jump[ed] the gun," and had acted irresponsibly when he said that. J.A. at 810-11 (Voir Dire Tr.). She further stated that she had not formed an opinion and that she had not really worried too much about the case.

J.A. at 812-13 (Voir Dire Tr.). Finally, she stated that she presumed Nevers to be innocent, J.A. at 828 (Voir Dire Tr.), that if asked for her vote she would have to say not guilty, id., and that she had no opinion at that time concerning guilt or innocence, J.A. at 831 (Voir Dire Tr.). She was passed for cause. J.A. at 833, 845 (Voir Dire Tr.).

Juror # 8 stated she heard from the media that several police officers were involved in the killing of Malice Green, that the media was portraying Nevers as guilty, J.A. at 858-59 (Voir Dire Tr.), and that it was the prevailing opinion of her co-workers that Nevers was guilty, J.A. at 860-61 (Voir Dire Tr.). The media's portrayal of the officers had bothered her, she said, because she felt those making such judgments had not heard the officers' side of the story and thus had not given them a fair chance. J.A. at 859 (Voir Dire Tr.). She also stated that she did not have an opinion as to guilt or innocence, J.A. at 849 (Voir Dire Tr.), that she had not formed an opinion because she had not had a chance to

hear the officers' sides of the story, J.A. at 859 (Voir Dire Tr.), and that it was both her legal and personal opinion that, as of that moment, Nevers was not guilty. J.A. at 862 (Voir Dire Tr.). Juror # 8 was passed for cause. J.A. at 854, 865 (Voir Dire Tr.).

Juror # 6 stated that she had read about the case in the newspapers, J.A. at 877 (Voir Dire Tr.), and that she had no opinion as to guilt or innocence, J.A. at 880 (Voir Dire Tr.). The people she worked with had all different opinions, ranging from guilty to not guilty. J.A. at 883 (Voir Dire Tr.). She was passed for cause. J.A. at 887 (Voir Dire Tr.).

Juror # 7 stated that she had heard about the case through T.V., and admitted that her first reaction was to compare it to the Rodney King incident, not out of any notion of the beating's having been racially motivated, but rather out of a fear that there might be a riot if the officers were acquitted. J.A. at 901-02 (Voir Dire Tr.). She further stated, however, that she no longer held that fear after talking with

her co-workers, as it was their opinion that if the officers were acquitted, the people of Detroit would not react as the citizens of Los Angeles had. See J.A. at 902-03 (Voir Dire Tr.). She stated that if asked at that moment she would have to find Nevers not guilty. J.A. at 906 (Voir Dire Tr.). She was passed for cause. J.A. at 893, 911 (Voir Dire Tr.).

Juror # 11 stated that he had heard very little about the case, and had not formed any opinions as to guilt or innocence at that time. See J.A. at 913, 924 (Voir Dire Tr.). He was passed for cause. J.A. at 924, 928 (Voir Dire Tr.).

The limited testimony in the Joint Appendix of jurors who were not chosen to serve on the panel tends to show that this crime and the media's portrayal of it did affect some potential jurors strongly. One potential juror admitted that she had made up her mind about Nevers's guilt and that she felt she could not give him a fair trial. She was excused for cause. J.A. at 888 (Voir Dire Tr.). Another potential juror, who was

struck peremptorily by defense counsel, J.A. at 675 (Voir Dire Tr.), had much to say about his opinion concerning "community sentiment." Defense counsel asked him his opinion on "what the community is saying," and he replied, "Well, the community, basically what I am hearing is that he is guilty. That's what I'm hearing." Defense counsel then stated, "Okay. In other words, at least, you have heard in the community that the general consensus of the community is that he--by he you mean Mr. Nevers, is guilty?" to which the juror stated, "Right." J.A. at 550 (Voir Dire Tr.). This potential juror also acknowledged that he had heard the Mayor say that Nevers was guilty, that he had a high regard for the mayor, and that when he heard the Mayor make that statement, he thought that the Mayor must have based it on some facts indicating Mr. Nevers's guilt. J.A. at 551-53 (Voir Dire Tr.). Finally, this potential juror acknowledged that based on what he had heard in the community, his own initial opinion was that Nevers was guilty. J.A. at 553 (Voir Dire

Tr.). Another potential juror stated that he read in the media "[t]hings basically intimating that [Nevers] is guilty." J.A. at 547 (Voir Dire Tr.). This same individual, however, stated that he did not have an opinion concerning guilt or innocence because he did not necessarily believe what he read in the media. J.A. at 546a (Voir Dire Tr.). Another potential juror admitted that initially she had formed an opinion as to Nevers's guilt and that the first reports had made her angry, but she thought she could set these aside because she thought Nevers deserved a fair trial. J.A. at 929-30 (Voir Dire Tr.). Another potential juror also admitted that she had formed "a slight opinion" and was "upset" when she initially heard about Green's death, but she also thought she could set that aside. J.A. at 930 (Voir Dire Tr.). Still others indicated that they had not formed opinions because they could not trust the media because the media had not been there when the alleged crime was committed. See J.A. at 934-36 (Voir Dire Tr.). One of these, however, admitted that he was angered when he

first learned of Green's death. J.A. at 935-37 (Voir Dire Tr.).

BRIGHT, Circuit Judge, concurring separately.

I concur in the result reached by the majority. I write separately because I disagree with the majority's approach to the "unreasonableness" standard. The majority combines the not entirely consistent standards enunciated by the First and Fifth Circuits. See O'Brien v. Dubois, 145 F.3d 16, 25 (1st Cir.1998); Drinkard v. Johnson, 97 F.3d 751, 769 (5th Cir.1996). The amalgamation of the two standards creates too rigid a bar to proper relief. Either standard alone gives deference to a state court's application of clearly established Supreme Court precedent as required by the language in the AEDPA. I prefer the Fifth Circuit's standard articulated in Drinkard, 97 F.3d at 769, which this circuit previously adopted in Herbert v. Billy, 160 F.3d 1131, 1135 (6th Cir.1998). In adopting the standard, we stated as follows:

> Under the AEDPA, the district court could find the state court determinations unreasonable "only when it can be said that reasonable jurists considering the question would be of one view that the state court ruling was incorrect. In

other words, we can grant habeas relief only if a state court decision is so clearly incorrect that it would not be debatable among reasonable jurists."

Herbert, 160 F.3d at 1135 (quoting Drinkard, 97 F.3d at 769).

The adoption of "the rule that the unreasonableness of a state court's application of clearly established Supreme Court precedent will not be 'debatable among reasonable jurists,' Drinkard, 97 F.3d at 769, if it is 'so offensive to existing precedent, so devoid of record support, or so arbitrary, as to indicate it is outside the universe of plausible, credible outcomes,' O'Brien, 145 F.3d at 25[,]" Maj. Op. at 19, approaches a suspension of the Writ of Habeas Corpus. We must be mindful of the constitutional restriction of Article I, Section 9, which, among other things, states "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." The privilege of the great Writ of Habeas Corpus is an ancient and important one. The congressional admonitions must be read in light of the writ's

extensive history. In terms of this case and other cases in which the great Writ is granted, the main purpose of the Writ is to release a person immediately from an unconstitutional constraint on that person's liberty. The "reasonable jurist" approach properly balances the statutory language of the AEDPA with the constitutional restriction against suspension of the Writ of Habeas Corpus.

The standard in Herbert clearly accords with the language of the AEDPA. To articulate in this case a standard for unreasonableness other than that adopted in Herbert seems unwise and unnecessary.

FN* The Honorable Myron H. Bright, Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

FN1. Officer Robert Lessnau was charged with assault with intent to murder and was tried with Budzyn and Nevers, but by the bench instead of a separate jury. The trial court acquitted Lessnau.

FN2. Nevers v. Killinger, 990 F.Supp. 884 (E.D.Mich.1997); People v. Budzyn, 456 Mich. 77, 566 N.W.2d 229 (Mich.1997).

FN3. The Michigan Supreme Court noted:

The trial judge did not select the movies or approve the selections himself, but he took responsibility for the action taken by the employees of the court. The trial judge disqualified himself on ruling on defendants' motion. The Chief Judge of Recorder's Court referred the motion to a third judge who heard the motion and denied it.
Budzyn, 566 N.W.2d at 234 n. 7.

FN4. The Budzyn jury deliberated eight days before returning a verdict of guilty. Budzyn received a sentence of eight to eighteen years. As noted previously, Budzyn's conviction was reversed and remanded for a new trial by the Michigan Supreme Court due to extraneous jury influences that the court held could not be found to be harmless error.

FN5. The district court in the case sub judice chose to employ the Fifth and Seventh Circuits' "categorization" approach (although it concluded that the result would be the same under the First Circuit's approach, discussed infra), see Nevers, 990 F.Supp. at 851 & n. 4. One month after the district court's determination, another judge in the Eastern District of Michigan also found the Fifth and Seventh Circuits' categorization approach to be appropriate. See Barker v. Yukins, 993 F.Supp. 592, 600-01 (E.D.Mich.1998).

FN6. In a footnote Neelley acknowledges that "[t]he overlap between the statute and Teague is not complete," Neelley, 138 F.3d at 923 n. 3, but found "no need to determine the exact overlap between Teague and § 2254 in this case because the Supreme Court case law governing Neelley's contentions was

manifestly clear at all relevant times," id.

FN7. But see Herbert v. Billy, 160 F.3d 1131, 1998 WL 801319, at *2 (6th Cir. Nov.20, 1998) (stating that after the advent of AEDPA, "[a] district court or court of appeals no longer can look to lower federal court decisions in deciding whether the state decision is contrary to, or an unreasonable application of, clearly established federal law") (emphasis added).

FN8. In Harpster we discussed the First Circuit case of Martin v. Bissonette, No. 96-1856, 1997 WL 280602 (1st Cir. May 29, 1997). This case was withdrawn and replaced by Martin v. Bissonette, 118 F.3d 871 (1st Cir.1997), which does not discuss the approach initially discussed in the withdrawn opinion. However, comparison of the original Martin to O'Brien shows that the standard enunciated in Martin is the one adopted and applied in O'Brien.

FN9. As we shall more fully address in a subsequent section of this opinion, the extraneous jury influence issue also involves an issue of whether the state courts' failure to make any factual inquiry into the actual effect, if any, of the extraneous information on the jury's verdict was contrary to clearly established law. This issue, however, may have been waived; it is difficult to determine whether it was raised on direct appeal, and was raised only by implication in the habeas proceedings. We address it because we view it as an inextricable aspect of the jury influence issue as specifically addressed by the state courts.

FN10. Accord Neelley, 138 F.3d at 924 ("[T]he mere fact that a district court disagrees with a state court

does not render that state court's decision 'unreasonable'; certainly two courts can differ over the proper resolution of a close question without either viewpoint being unreasonable."); Hennon v. Cooper, 109 F.3d 330, 334 (7th Cir.), cert. denied, --- U.S. ----, 118 S.Ct. 72, 139 L.Ed.2d 32 (1997) ("[T]he fact that we might disagree with the state court's determination that the prosecutor's remarks did not deny Hennon due process because they are unlikely to have swayed the jury--might think the determination incorrect-- would not carry the day for him."); Drinkard, 97 F.3d at 768 ("This 'unreasonable application' standard of review of a state court decision must mean more than that a federal court may grant habeas relief based on its simple disagreement with the state court decision; this would amount to nothing more than a de novo review.").

FN11. The Michigan Supreme Court affirmed this part of the court of appeals decision on the basis of that court's opinion. Budzyn, 566 N.W.2d at 234.

FN12. At least 53,000, and maybe as many as 97,000, people were estimated to have seen the tape of the televised confession at least once. See Rideau, 373 U.S. at 724.

FN13. Rideau was cited in a footnote as a precedent "describing situations in which state procedures are inadequate to uncover bias." Patton, 467 U.S. at 1038 n. 13.

FN14. Accord DeLisle v. Rivers, 161 F.3d 370, ----, 1998 WL 817815, at *17 (6th Cir. Nov.30, 1998) (stating "it was only 'the televising of a defendant in the act of confessing to a crime' that the Rideau Court held 'was inherently invalid under the Due Process Clause of the Fourteenth Amendment.' ") (quoting

Estes v. Texas, 381 U.S. 532, 538, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965)) (emphasis added in DeLisle).

FN15. Indeed, the district court's description of the media coverage alone encompasses over eight pages of the Federal Supplement. See 990 F.Supp. at 855-63.

FN16. One pretrial incident was a three-day "inquest" broadcast live over T.V. and radio at which "Sheppard was brought into the room by police who searched him in full view of several hundred spectators," he was "questioned for five and one-half hours about his actions on the night of the murder," his "counsel were present ... but were not permitted to participate," and "[w]hen Sheppard's chief counsel attempted to place some documents in the record[ ] he was forcibly ejected from the room by the Coroner, who received cheers, hugs, and kisses from ladies in the audience." Sheppard, 384 U.S. at 339-40.

FN17. Accord DeLisle, 161 F.3d 370, ----, 1998 WL 817815, at *17 ("There is no allegation by DeLisle that his trial took place under the conditions of total chaos that prevailed in Estes and Sheppard, and a review of those cases leaves no room for doubt that it was that chaos that drove those decisions. See Murphy, 421 U.S. at 799.") (emphasis added).

FN18. The articles described Nevers's and Budzyn's reputations as "hard line police officers," id., who often used force and intimidation "as tools of persuasion," J.A. at 424 (Ex. M32 (Detroit News Nov. 8 Article)), thus garnering them the nicknames "Starsky and Hutch" in the neighborhood in which they patrolled, id. The articles also mentioned previous instances of police brutality alleged against

Nevers, see Nevers, 990 F.Supp. at 855-57, and Nevers's former membership in STRESS (Stop the Robberies Enjoy Safe Streets), "a controversial undercover unit that was involved in alleged harassment of young black men before it was disbanded by Former Detroit Mayor Coleman Young." Id. at 855. Another article mentioning Nevers's STRESS participation "specifically referred to the officers involved in STRESS as major culprits of police brutality and stated that the controversial unit was involved in the deaths of twenty people, seventeen of whom were black." Id. at 855-56. Other articles compared the incident to the Rodney King beating; see id. at 856. Many of the articles and editorials involved criticism of the police department generally, especially concerning the way in which it had previously handled police officers with histories of violent behavior. The Mayor of Detroit even stated, on national television, "A young man who was under arrest was literally murdered by police." The Mayor's statement was subsequently reported in the newspaper. See id. at 859.

FN19. See supra note 18.

FN20. The court refused to consider the fourth affidavit, which the juror who produced it had refused to sign. Nevers had attempted to remedy the lack of a signature by submitting an affidavit from an attorney who swore that the juror had verbally adopted the statements made in the affidavit but had refused to sign out of fear that it would bring renewed media and public pressure upon her. The court, however, correctly adduced that such an attesting affidavit would make the juror's affidavit inadmissible hearsay.

Budzyn, 566 N.W.2d at 236 n. 14.

FN21. After the Michigan Supreme Court had determined that the appellants had shown the error to be constitutional error the court stated, "Because defendants have carried their initial burden, we must decide whether any error was harmless beyond a reasonable doubt." Budzyn, 566 N.W.2d at 240 (emphasis added). While the Michigan Supreme Court did not specifically cite Chapman or any other Supreme Court precedent (it cited Ninth Circuit precedent instead), we agree with the district court that it "clearly applied the proper Chapman harmless error standard on direct review," Nevers, 990 F.Supp. at 870 (citing Budzyn, 566 N.W.2d at 240). See Clemons v. Mississippi, 494 U.S. 738, 744, 753, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990) (finding that Mississippi Supreme Court had applied Chapman standard, even though it had not cited Chapman, from its statement, " 'We likewise are of the opinion beyond a reasonable doubt that the jury's verdict would have been the same with or without the 'especially heinous, atrocious or cruel' aggravating circumstance.' "); Barker v. Yukins, 993 F.Supp. 592, 603 (E.D.Mich.1998) (finding that although the Michigan Supreme Court did not cite to decisions of the United States Supreme Court, it clearly applied the Chapman harmless error analysis, and thus its decision was reviewable under the "unreasonable application" clause of § 2254(d)(1)).

FN22. The Fourth Circuit, in Green v. French, 143 F.3d 865 (4th Cir.1998), combined the two without specifically addressing the question of whether one or the other must apply. It held
that the North Carolina Supreme Court correctly

concluded under Chapman that the trial court's failure to instruct the sentencing jury as to ... non-statutory mitigating factors was harmless under the standard for direct review, and, a fortiori, that the trial court's error was harmless under the less exacting standard for federal habeas review of state court convictions under Brecht v. Abrahamson ....
Id. at 893 (citation omitted). The court then articulated its reasons for so finding and concluded by stating, "Green therefore has not met his burden of establishing that these errors were prejudicial under the Brecht standard." Id. at 894.

FN23. Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), held that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." Id. at 24. In so holding, the Court said, it did "no more than adhere to the meaning of our Fahy case." Id. Fahy v. Connecticut, 375 U.S. 85, 86-87, 84 S.Ct. 229, 11 L.Ed.2d 171 (1963) held that "the question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction."

FN24. Although Hughes does not directly cite Chapman v. California, it does rely on Marino v. Vasquez, 812 F.2d 499 (9th Cir.1987), which cites to Chapman.

FN25. We suppose that where a state court decision is contrary to clearly established federal law, the error may still be found to be harmless. In the case before us today, however, the denial of due process could not be harmless error under either the Chapman or Brecht

standards because it resulted in the denial of Nevers's right to demonstrate that the admittedly prejudicial material improperly in the jury's possession actually affected the jury's verdict.

APPENDIX B

PEOPLE of the State of Michigan, Plaintiff-Appellee,

v.

Walter BUDZYN, Defendant-Appellant.

PEOPLE of the State of Michigan, Plaintiff-Appellee,

v.

Larry NEVERS, Defendant-Appellant.

Docket Nos. 102654, 102655.

Calendar Nos. 1-2.

Supreme Court of Michigan.

Argued Nov. 12, 1996.

Decided July 31, 1997.

Two white police officers were convicted by separate juries in the Recorder's Court of Detroit, George W. Crockett III, J., of the second-degree murder of a black suspect. Each defendant appealed. The Court of Appeals consolidated appeals, and affirmed convictions. Leave to appeal was

granted, and the Supreme Court, Riley, J., held that: (1) jury was exposed to extrinsic evidence creating real and substantial possibility of prejudice; (2) this error was harmless beyond reasonable doubt as to officer seen beating suspect on head with police flashlight; and (3) this error was not harmless beyond reasonable doubt as to officer who was not actually seen striking defendant on head.

Court of Appeals' decision affirmed in part, and reversed in part.

Boyle, J., concurred in part, dissented in part, and filed opinion.

Mallett, C.J., concurred in part, dissented in part, and filed opinion.

Frank J. Kelley, Attorney General, Thomas L. Casey, Solicitor General, John D. O'Hair, Prosecuting Attorney, Timothy A. Baughman, Chief, Research, Training and Appeals, and Olga Agnello, Assistant Prosecuting Attorney, Detroit, for the People.

Carole M. Stanyar, Detroit, for Defendant-Appellant Budzyn.

Neil H. Fink, Birmingham, for Defendant-Appellant Nevers.

William J. Johnson, pro hac vice, Washington, DC and Frank A. Guido, General Counsel for Police Officers Association of Michigan, Livonia, amicus curiae, for National Association of Police Organizations, Inc.

Opinion

RILEY, Justice.

In this appeal, we are asked to review the fairness of the trial for two police officers who were convicted of second-degree murder for killing a suspected drug user while attempting to arrest him while the suspect was holding contraband. We conclude that defendants have demonstrated that their juries were exposed to extrinsic influences that created a real and substantial possibility of prejudice, depriving them of their constitutional rights under the Sixth Amendment. These errors, however, were harmless *81 beyond a reasonable doubt with regard to defendant Larry Nevers. Therefore, we affirm defendant Nevers' conviction. With regard to defendant Walter Budzyn, we conclude that the extrinsic influences were not harmless beyond **232 a reasonable

doubt. Accordingly, we vacate defendant Budyzn's conviction and remand for a new trial.

FACTS AND PROCEEDINGS

Defendants Budzyn and Nevers were police officers with the Detroit Police Department. They were on duty when the incident occurred that resulted in Malice Green's death. Both were tried at a single criminal proceeding with two different juries. [FN1]

> FN1. There were charges that their crime was racially motivated. Consequently, we note that Budzyn and Nevers are white and Malice Green is black.

On November 5, 1992, at approximately 10:15 p.m., defendants were patrolling in the City of Detroit in plain clothes in an unmarked vehicle. They apparently observed a Topaz, driven by Malice Green, with bullet holes in its front passenger door. Defendant Nevers, who only gave testimony before his own jury, testified that he observed the car pull up in front of a house known for its drug activity. Budzyn and Nevers stopped behind the Topaz to investigate. The home,

with a storefront attached to it, was occupied by Ralph Fletcher. Fletcher explained that others used his house for illegal drug activities. Robert Hollins and Teresa Pace, witnesses to the event, were present at Fletcher's house and had been smoking cocaine that evening.

Defendant Budzyn, who only testified before his own jury, said that he witnessed Robert Knox running *82 along the building and explained that he chased Knox because, apparently by mistake, he believed that Knox had been in the vehicle with Green. [FN2] Budzyn caught Knox, brought him around to the front of Fletcher's place, and patted him down for weapons. He also patted down Fletcher, who had been in the car with Green. Manuel Brown, who had been smoking cocaine at Fletcher's place, was walking away from the house, but stopped to watch this activity. Nevers asked Malice Green for his driver's license. Green did not respond to Nevers' request, but walked around to the passenger side of his vehicle and got in. Green was sitting in the passenger

seat, with his legs hanging out the open doorway. Budzyn came around to the passenger side, shined his flashlight on him, and asked for his license. Green began to look in the glove compartment, grasped at something that was on the floor, apparently cocaine, and Budzyn asked him to let go of what was in his hand.

> FN2. Budzyn was apparently mistaken because Fletcher was the only passenger in the Topaz with Green; Knox had traveled to Fletcher's place with Hollins at approximately 7:00 p.m. that evening. Knox had paid Hollins $15 (in cash and cocaine) to drop him off at the house.

At this point, there is substantial disagreement in the testimony given by defendants Budzyn and Nevers and the witnesses to the incident, Brown, Fletcher, Hollins, Knox, and Pace regarding what happened.

The five civilian witnesses testified that after Green refused to open his hand, Budzyn began to hit him repeatedly on the hand with the police flashlight, telling him to open his hand. Budzyn then climbed onto Green, who did not resist

but did not comply, straddling him. Brown testified that Budzyn struck Green about ten times on his head with the flashlight. ***83** Fletcher, who was only three to five feet away, testified that Budzyn repeatedly hit Green on the hand. Hollins said that he heard Budzyn hit Green six or seven times, and, although he did not see the blows land, that these blows must have landed on Green's head. Knox said that he saw Budzyn hit Green in the hand because Green did not open it when Budzyn asked. [FN3] Pace testified that from the position on which Budzyn sat on Green, he must have been hitting him on the head.

> FN3. Knox's testimony from the preliminary examination was read to the jury because Knox died before trial.

These five witnesses also said that, while Budzyn was struggling with Green in the Topaz, Nevers struck Green on his knee several times. Brown and Fletcher said that Nevers then went around to the other side of the car, the driver's side, opened the door, and struck Green, who was now lying on the

front seat, on the head with his flashlight. [FN4] **233 Nevers instructed these people to leave the scene.

FN4. Fletcher said he saw Nevers land two blows to Green's head with a golf-like swing.

In contrast to this testimony, Budzyn explained to his jury that while Green was sitting in the passenger side of the vehicle, he suspected that Green was holding narcotics in his fist. He said that he grabbed Green's right arm and that Green kicked him with both his legs. He produced evidence of a small injury to his knee. Budzyn said that he turned and fell backward into the vehicle, dropping his flashlight. Budzyn denied that he ever hit Green at all. Budzyn also said that he only held Green's hands because he suspected that he was holding narcotics. Budzyn called for backup assistance. Budzyn explained that he heard *84 "two hits" after Nevers went around to the driver's door and said that he later was "shocked" to find so much blood on the scene. Budzyn said he retrieved four rocks of cocaine from inside the vehicle.

Like Budzyn, Nevers testified to his jury that he assisted Budzyn when Green resisted Budzyn's efforts to open his hand. Nevers explained that he only hit Green on his knees when Green brought his knees up to stop Nevers from prying open his hand. Nevers then went to the other side of the vehicle because Budzyn told him that Green was attempting to get out of the other side of the car. Nevers then told the people from Fletcher's place to leave. Nevers explained that he hit Green in the head with his flashlight because Green was grabbing for his gun. Nevers said that after he struck him, "[Green] finally let go of my gun and I did not hit him [again]" at that time. Nevers flagged down the EMS medical technicians who had been called to the scene. Green continued to struggle with the officers and Nevers said he saw something "shiny" in Green's right hand and he struck him again, the blow landing on Green's head, because Nevers feared he might be carrying a razor blade or knife. Nevers admitted that, during the course of the incident he hit Green

five or six times on the head with his flashlight.

The EMS medical technicians arrived in two vehicles. The first to arrive were Albino Martinez and Mithyim Lewis. The other EMS vehicle soon arrived with two other medical technicians, Lee Hardy and Scott Walsh. Several marked police cars arrived soon after the EMS vehicles. Martinez, Lewis, Hardy, and Walsh all testified that Green was covered with blood and was hanging from the driver's side door when *85 they arrived. There was a pool of blood under his head on the street. These witnesses said that Nevers struck Green in the head with his heavy police flashlight repeatedly even though Green was not offering any significant resistance. Martinez and Walsh said that Nevers told Green to open his hands and hold still, and that, when he did not, Nevers hit him with the flashlight. Martinez and Lewis said that Nevers hit Green four times in the head with the flashlight, while Hardy said he saw Nevers hit Green approximately ten times in the head. Martinez explained that Green was "dazed," and

Hardy described him as "stuporous," relating that Green was uttering only a few words like "wait" while Nevers was striking him.

Officer Robert Lessnau, [FN5] who arrived on the scene in one of the marked police vehicles, pulled Green from the vehicle. The EMS medical technicians testified that Lessnau hit Green with his fists. Martinez and Walsh said that while Lessnau was striking Green, Nevers also hit Green twice in the ribs. Green finally released the car keys he held in one hand and a piece of white paper, apparently for rolling rock cocaine, he held in the other. The uniformed officers, including Sergeant Freddie Douglas, [FN6] then cuffed Green's hands behind his back as Green struggled. The EMS medical technicians began rendering care to Green. Green suffered a seizure and, soon after, died.

> FN5. Officer Lessnau was charged with assault with intent to murder. He was tried at the same time as Budzyn and Nevers in a bench trial. The trial court acquitted him.
>
> FN6. Sergeant Douglas was charged with a crime but

the magistrate dismissed the charge at his preliminary examination.

The people presented Dr. Kalil Jiraki, an assistant Wayne County Medical Examiner, as a medical expert *86 to testify regarding the nature of Green's wounds and the cause of his death. Dr. Jiraki testified that Green **234 died from "[b]lunt force trauma to [his] head" and that he suffered at least fourteen blows to the head. Dr. Jiraki also explained that Green had 0.5 micrograms of cocaine in his body, indicating that he was under the influence of cocaine at the time of his death. He concluded, however, that it had "no bearing on the cause of his death." In response, defendants presented three pathologists, one of whom, Dr. L.G. Dragovic, testified that he identified eleven blunt-force injuries to Green's head.

Budzyn and Nevers were charged with second-degree murder. Beginning with the first reports of Green's death, the case produced a firestorm of media publicity in the Detroit

metropolitan area. The incident occurred soon after the California state courts acquitted four white Los Angeles police officers who had been videotaped beating black motorist Rodney King. The acquittal in the King case resulted in a terrible riot in Los Angeles that drew the attention of the national media. The media reports in Detroit of Green's death included a comparison of the two incidents. Before the trial began, the Detroit Police Department fired defendants. The City of Detroit also agreed to a multimillion dollar settlement with Green's estate. In response to some criticisms of the settlement, a city attorney stated that a generous settlement might spare the city the riotous violence that racked Los Angeles after the acquittal of the police officers. These events occurred during the interval between Green's death in November 1992 and the start of defendants' trial in June 1993, seven months later.

*87 Defendants moved to sever the trials, and the trial court refused to separate the proceedings, but did grant

defendants separate juries. Nevers asked for a change of venue because of the extensive pretrial publicity, but the trial court denied this motion. The trial court began the voir dire on June 2, 1993. The people began presenting their case on June 18, 1993. During a recess near the end of trial, on August 5 and 6, 1993, the trial court provided the juries with several film videos to watch to entertain themselves, including a copy of Malcolm X. The film begins with a video of the Los Angeles police officers beating Rodney King. Defendants moved for a mistrial on this basis, but this motion was denied. [FN7]

> FN7. The trial judge did not select the movies or approve the selections himself, but he took responsibility for the action taken by the employees of the court. The trial judge disqualified himself on ruling on defendants' motion. The Chief Judge of Recorder's Court referred the motion to a third judge who heard the motion and denied it.

After approximately seven weeks of trial, the juries began deliberating on August 13, 1993. Budzyn and Nevers were convicted of second-degree murder. The jury in

Budzyn's trial deliberated for eight days, and, in Nevers' trial, the jury deliberated for nine days. Budzyn was sentenced to serve eight to eighteen years, and Nevers was sentenced to twelve to twenty-five years in prison. Defendants moved for a new trial, but the trial court denied this motion.

On appeal by right, the Court of Appeals consolidated defendants' appeals and affirmed the convictions in an unpublished opinion per curiam, issued March 22, 1995 (Docket Nos. 170477, 170478). Defendants appealed to this Court, and this Court ***88** granted leave. [FN8] In reviewing the many claims of error raised on appeal, we have only provided an analysis of the claim regarding the extrinsic influences on the jury. For the remaining claims, we believe that the Court of Appeals has properly responded to these claims and we affirm its decisions with regard to them. [FN9]

FN8. 451 Mich. 884, 549 N.W.2d 573 (1996).

FN9. We note that one claim of error was conceded by defendants on appeal to this Court. Defendants acknowledge that their claim regarding an instructional error was resolved by this Court's

decision in People v. Tims, 449 Mich. 83, 99, 534 N.W.2d 675 (1995), in which we held that a defendant may be convicted of a crime if his culpable conduct was "a" proximate cause of death.

ANALYSIS

I. The Standard for Claim of Error for Extrinsic Influences on the Jury

A defendant tried by jury has a right to a fair and impartial jury. People v. ****235** Tyburski, 445 Mich. 606, 618, 518 N.W.2d 441 (1994) (Mallett, J., plurality opinion), citing Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968). During their deliberations, jurors may only consider the evidence that is presented to them in open court. See United States v. Navarro-Garcia, 926 F.2d 818, 820 (C.A.9, 1991). Where the jury considers extraneous facts not introduced in evidence, this deprives a defendant of his rights of confrontation, cross-examination, and assistance of counsel embodied in the Sixth Amendment. See Hughes v. Borg, 898 F.2d 695, 700 (C.A.9, 1990).

In order to establish that the extrinsic influence was

error requiring reversal, the defendant must initially prove two points. First, the defendant must prove that the jury was exposed to extraneous influences. ***89** See Marino v. Vasquez, 812 F.2d 499, 504 (C.A.9, 1987). See also United States v. Caro-Quintero, 769 F.Supp. 1564, 1573 (C.D.Cal., 1991). Second, the defendant must establish that these extraneous influences created a real and substantial possibility that they could have affected the jury's verdict. See Hughes, supra at 700. [FN10] Generally, in proving this second point, the defendant will demonstrate that the extraneous influence is substantially related to a material aspect of the case and that there is a direct connection between the extrinsic material and the adverse verdict. See Caro-Quintero, supra at 1574, citing United States v. Bagnariol, 665 F.2d 877, 885 (C.A.9, 1981). [FN11] If the defendant establishes this initial burden, the burden shifts to the people to demonstrate that the error was harmless beyond a reasonable doubt. We examine the error to determine if it is harmless beyond a reasonable doubt

because the error is constitutional in nature. See People v. Anderson (After Remand), 446 Mich. 392, 406, 521 N.W.2d 538 (1994). The people may do so by proving that either the extraneous influence was duplicative of evidence *90 produced at trial or the evidence of guilt was overwhelming. See Hughes, supra at 700.

> FN10. The inquiry whether the extrinsic influences could have affected the jury's verdict is an objective inquiry. See Dickson v. Sullivan, 849 F.2d 403, 406 (C.A.9, 1988).
>
> FN11. This Court may also consider the following factors in determining whether the extrinsic influence created a real and substantial possibility of prejudice: (1) whether the material was actually received, and if so how; (2) the length of time it was available to the jury; (3) the extent to which the juror discussed and considered it; (4) whether the material was introduced before a verdict was reached, and if so at what point in the deliberations; and (5) any other matters which may bear on the issue of the reasonable possibility of whether the extrinsic material affected the verdict. [Marino, supra at 506.]

II. Application of the Standard

A. Exposure to Extrinsic Evidence

In examining the extraneous influences that

defendants claim affected the juries' verdicts, we shall focus on defendants' claims from juror affidavits that the juries were exposed to (1) the film Malcolm X, (2) media reports during the trial of existing contingency plans in case of rioting, i.e., placing the National Guard on alert and closing the freeways in the event the juries acquitted, and (3) the claim that the jurors considered as a factor defendants' supposed participation in the police unit known as STRESS (Stop the Robberies Enjoy Safe Streets) [FN12] even though there was no evidence about this produced at trial. There is no dispute that the trial court provided the film Malcolm X to the juries, which they watched (at least in part) on August 5, 1993, and on August 6, 1993. [FN13] This viewing occurred near the end of trial: the trial had begun on June 18, 1993, and the juries began deliberating on August 13, 1993. The affidavits confirmed that the jurors had **236 watched, at least in part, Malcolm X. Defendants also rely on these juror affidavits to assert that the two other alleged extraneous *91

influences listed above affected the juries' verdicts.

> FN12. STRESS was a controversial decoy unit of the Detroit Police Department that gained a reputation for brutality. A juror from the Nevers' trial stated that "[i]t was explained during deliberations that STRESS was a police group that regularly abused young black males in the city." Emphasis added. Defendant Nevers was apparently previously a member of this unit, while defendant Budzyn apparently was not previously a member.

> FN13. Before this date, on August 2, 1993, the trial court had informed the juries that they would have to be in their jury rooms on August 5, 1993, and August 6, 1993, even though there would be no court-related activity.

Generally, jurors may not impeach their own verdict by subsequent affidavits showing misconduct in the jury room. People v. Pizzino, 313 Mich. 97, 108, 20 N.W.2d 824 (1945). See also Tanner v. United States, 483 U.S. 107, 107 S.Ct. 2739, 97 L.Ed.2d 90 (1987). As the Court of Appeals has previously noted, once a jury has been polled and discharged, its members may not challenge mistakes or misconduct inherent in the verdict. Rather, oral testimony or affidavits may only be received on extraneous or outside

errors, such as undue influence by outside parties. See Hoffman v. Monroe Public Schools, 96 Mich.App. 256, 257-258, 292 N.W.2d 542 (1980), citing Mattox v. United States, 146 U.S. 140, 13 S.Ct. 50, 36 L.Ed. 917 (1892). See also People v. Larry Smith, 106 Mich.App. 203, 211-212, 307 N.W.2d 441 (1981). As the United States Supreme Court has explained, the distinction between an external influence and inherent misconduct is not based on the location of the wrong, e.g., distinguished on the basis whether the "irregularity" occurred inside or outside the jury room. Rather, the nature of the allegation determines whether the allegation is intrinsic to the jury's deliberative process or whether it is an outside or extraneous influence. See Tanner, supra at 117-118, 107 S.Ct. at 2745-46. In examining these affidavits, a trial court should not investigate their subjective content, but limit its factual inquiry to determining the extent to which the jurors saw or discussed the extrinsic evidence. See Dickson v. Sullivan, 849 F.2d 403, 406 (C.A.9, 1988).

*92 After reviewing the three sworn juror affidavits, [FN14] we believe that we may consider these affidavits to determine whether they met the threshold requirement. The three influences culled from the sworn affidavits, as identified above, were extraneous to the trial proceedings and did not result exclusively from juror misconduct inherent in the verdict. According to these sworn statements, the juries were exposed to, and considered during deliberations, extraneous factors regarding whether defendants Budzyn and Nevers were guilty of second-degree murder.

> FN14. Defendants together produced four affidavits from jurors who sat during trial, three from defendant Nevers' trial and one from defendant Budzyn's trial. The trial court refused to grant an evidentiary hearing regarding these affidavits, but instead accepted the statements as true regarding what occurred before and during deliberations.
> One of the affidavits that defendant Nevers relies on was not signed by the juror. We have not considered this affidavit. Defendant Nevers attempted to remedy the deficiency by producing an affidavit from an attorney who swore that the particular juror had verbally adopted all of the statements, but only refused to sign the affidavit because she feared that it would bring "renewed pressure to her from the media and from the public." However, the attorney cannot

testify with respect to these juror's statements because that testimony would be hearsay. Hence, the attorney's affidavit has not cured this fundamental defect. Consequently, for this appeal, there are only three sworn juror affidavits that we may consider.

B. Real and Substantial Possibility of Prejudice

We must next determine whether defendants have established that there is a real and substantial possibility that these extrinsic influences could have affected the juries' verdict. When considering that (1) the juries viewed the film Malcolm X as a group near the end of trial, (2) the juries, or a member, were exposed during deliberations to the fact the City of Detroit was bracing for a riot in the event of an acquittal, and (3) the juries were exposed to extrinsic *93 information, in part inaccurate, that defendants were previously members of the STRESS police unit, we believe that each defendant has established his initial burden.

The first of these influences that we address is the Malcolm X film. The film is a work based on Malcolm X's autobiography. The juries viewed the film with the

understanding that it had been provided, with three others, as entertainment by the trial court during a period late in trial where there were no trial proceedings. The film begins with the voice of Malcolm X's character giving a provocative speech charging "the **237 white man with being the greatest murderer on earth" while the viewer is shown footage of Rodney King being beaten by Los Angeles police officers, interspersed with a picture of an American flag. [FN15] The Rodney King videotape is shown in slow motion, in eight *94 segments, as the American flag begins to burn. Id. The voice- over makes an explicit reference to the City of Detroit, the location of the incident in the instant case, by stating that the black community has been deprived of democracy in the "streets of Detroit." Id. The factual similarities between (1) Rodney King's assault by police officers in Los Angeles as captured by the video shown at the beginning of Malcolm X and (2) the police brutality inflicted against Malice Green in Detroit, as charged, are striking. The parallel is

unmistakable. [FN16]

FN15. The character of Malcolm X gives a voice-over narrative at the beginning of the film:

Brothers and sisters, I am here to tell you that I charge the white man, I charge the white man with being the greatest murderer on earth. I charge the white man with being the greatest kidnapper on earth.

There is no place in this world that man can go and say he created peace and harmony. Everywhere he's gone he's created havoc. Everywhere he's gone he's created destruction. So I charge him, I charge him with being the greatest kidnapper on this earth. I charge him with being the greatest murderer on this earth. I charge him with being the greatest robber and enslaver on this earth. I charge the white man with being the greatest swine eater on this earth, the greatest drunkard on this earth. He can't deny the charges. You can't deny the charges. We're the living proof of those charges. You and I are the proof. You're not an American. You are a victim of America.

You didn't have a choice coming over here. He didn't say "black man, black woman, come on over and help me build America." He said "nigger get down in the bottom of that boat and I'm taking you over there to h e l p m e b u i l d America." Being born here does not make you an American. I'm not an American. You're not an American. You're one of the twenty-two million black people who are the victims of America.

* * * * * *

... We didn't see any democracy on the streets of

> Harlem, ... on the streets of Detroit .... No, we've never seen democracy. All we've seen is hypocrisy. We don't see any American dream. We've experienced only the American nightmare. [Emphasis added.]
>
> FN16. In fact, according to a juror in the Nevers trial, one of the "juror [s]" who was "not chosen to sit [apparently a venireman] ... actually thought that the Rodney King video was a video of the Malice Green incident."

Later, in a different scene of the film, the character portraying Malcolm X states:

> No, I'm telling you that devil has made dead souls out of you and I[sic].... Why, my brothers and sisters, he should get down on his knees. He should beg our mercy. Oh, my brothers and sisters, his kind has committed God's greatest crime against your and my kind every day of his life. He ought to get on his knees and say he's committed the crime. But does he do that? Does he do that? No. No, he scorns you. He splits your head with his night stick, he busts you upside of the head with that billy club, he calls you a nigger. I'm telling you he calls you a coon. That's what he says to you---"Boy," "Nigger." Four hundred years *95 is long enough. You've been sitting down, laying down, and bowing down for four hundred years. I think it's time to stand up. [Emphasis added.]

In the second half of the film that was only seen by the Budzyn jury, [FN17] Malcolm X's character is forced to rescue a member of the Nation of Islam from the police

station. A bystander explains that a police officer had "crack[ed]" him with (presumably) his night stick and the man began to bleed like a "stuck hog." [FN18] Soon after this episode, in **238 scenes only viewed by the Budzyn jury, Malcolm X's character gives a speech before an audience in which he states (interspersed with actual footage from the 1960s of violence by white police officers against the black community):

> FN17. The juror from the Budzyn trial swore to the following:
> It appeared that all jurors, including our one alternate, watched Malcolm X, including the opening segment which showed the Rodney King footage. We began the movie on Thursday [August 5, 1993] and completed it on Friday [August 6, 1993].A juror from the Nevers trial stated that "we watched the first, but not the second video cassette of that movie." These excerpts from the second half of the film are taken only from the second cassette.
>
> FN18. Malcolm X confronts the police who finally relent and allow him to call an ambulance and take the bleeding man from the police station to the hospital. Id.

A hundred years ago, they used to put on white sheets and sic bloodhounds on us. Well, nowadays they've traded in

the sheets___well, some of them traded in sheets___ ... they have traded in those white sheets for police uniforms. They've traded in the bloodhounds for the police dogs.

* * * * * *

***96** You've got these Uncle Tom negro leaders today that are telling us we ought to pray for our enemy. We ought to love our enemy. We ought to integrate with an enemy who bombs us, who kills and shoots us, who lynches us, who rapes our women and children. No! (interspersed with scene of Ku Klux Klan).

The greater context of the film did not dull these words because they are strikingly inflammatory. The power of these words might have triggered an emotional response by the jury, because defendants' conduct, as alleged, could arguably fit the description given by Malcolm X's character. There is some indication that it did evoke such a response. A juror from the Budzyn trial swore that apparently this scene of the film excited a response from one of the other jurors while they watched the movie as a group:

I specifically recall that segment of the movie in which Malcolm X compares police officers to the Ku Klux Klan. I also specifically recall that there was a verbal reaction by at least one juror when that speech was made.

As an extraneous influence, this film did not, strictly speaking, introduce any outside information about this event, i.e., extrajudicial facts about defendants, Malice Green, or the incident itself. Nevertheless, the viewing of the film, with its forceful words and images, may have undermined the juries' ability to examine impartially defendants' credibility. Both defendants testified and gave accounts of the altercation that conflicted with that of the witnesses for the prosecution. [FN19] The images of police brutality from *97 Malcolm X confirmed the people's description of defendants' conduct, thereby lending additional credibility to the people's case.

> FN19. Defendant Budzyn testified on July 20, 1993, and defendant Nevers testified on August 3, 1993.

Moreover, the juries may have found it difficult to set aside, when they examined the testimony of these particular defendants, the accusations expressed by Malcolm X's character in the film, and suggested by the Rodney King videotape, that white police officers were brutal racists who

could not be trusted. The jurors may have been less willing to believe that defendants, as white police officers, could be trusted. [FN20] In focusing the jurors' attention in a very emotional way on the racial element of the crime, the images from the film invited the juries to view the instant crime as a part of a pattern of police brutality, effectively asking them to redress this injustice. The juries were, however, bound to decide the case on only the facts as presented at trial and to weigh defendants' credibility without consideration of these extraneous factors.

> FN20. We are not contending that their testimony was credible, but only that their testimony should have been reviewed without bias.

These themes from Malcolm X of racial bigotry by the police force tied into, and intensified, the significance of the jurors' exposure to other facts extrinsic to the trial. The affidavits indicate that the Budzyn jury and one member of the Nevers jury were exposed to the fact, during deliberations, that the City of Detroit was bracing for a riot in

the event of an acquittal. Such rioting, of course, occurred in Los Angeles after the acquittal of the white police officers who were charged with assaulting Rodney King. The juror from Budzyn's trial swore that this fact had *98 been discussed by the Budzyn jury during deliberations:

> During the trial at one point the question was raised whether "they" would riot if we didn't convict. Towards the end of deliberations but before I signed the verdict **239 form, someone mentioned reports that freeways and businesses might be closed. It was also discussed that the National Guard had been put on alert for the end of the trial.

A juror in the Nevers trial indicated that he had learned from news reports and other sources about the city's preparation for a possible riot. [FN21] There is no indication that the Nevers' jury ever discussed this point during deliberations. Yet, according to an affidavit, the Nevers' jury did discuss, before deliberations, the "similarities between Rodney King and this case" because "it was cops beating a black man." Like the exposure to the film, the fact that the city braced for a riot should be irrelevant to the juries'

deliberations because they are bound to issue their decisions in accordance with law. They should not consider whether there would be a riot if they acquitted. The reality is, however, that the jurors' knowledge that the city was preparing for a possible riot may have caused them to fear an acquittal.

This juror stated:

> During our deliberations, we were allowed to go home one night. While I was home, I saw a news report that in the event of a riot, they were going to close the freeways. In addition to this information, I learned various other pieces of information at different times, both before and during trial. I had learned that the National Guard was being put on alert for our verdict.

Furthermore, the jurors were also exposed to the supposed fact that each defendant had previously *99 been a member of the STRESS unit. According to the affidavit of a juror from the Nevers trial, "[i]t was explained during deliberations that STRESS was a police group that regularly abused young black males in the city." The jurors also

discussed this point that defendants were prior participants in STRESS during deliberations. [FN22] This is the kind of concrete, factual evidence that could substantially compromise the ability of a jury to issue a fair verdict because the evidence relates directly to the past conduct of the police officers. This extraneous influence creates more than an emotional reason to convict. It suggests, if the perceptions were true about the nature of the STRESS police unit and defendants' participation in it, that these officers may have been acting in accordance with their preexisting racist predisposition to target young black men for abuse when they encountered Malice Green. [FN23] This evidence was never introduced at trial. It is the kind of evidence that has a direct and rational connection between it and an adverse verdict. See Bagnariol, supra at 885. The ***100** United States Court of Appeals for the Eighth Circuit explained how damaging such extrinsic evidence may be when it affects a defendant's credibility, particularly in a case, like this one, that was a

credibility contest:

> FN22. The juror from the Budzyn trial swore that the assertion was raised during deliberations:
> During the first few days of deliberations, [a][j]uror ... advised another juror in the presence of and within earshot of all the jurors that "they were part of STRESS," referring at the time to both Nevers and Budzyn. This statement appeared to be accepted and believed by my fellow jurors.
> The juror in the Nevers trial stated as follows:
> During deliberations, Mr. Nevers' participation in STRESS was discussed, and it kind of set the tone from the beginning of our deliberations. [Emphasis added.]
>
> FN23. We do not intend to express an opinion about the STRESS unit. Rather, we are only attempting to relate the jurors' perception about the character of the unit.

> The [extrinsic] comments [in this case] relate to factual questions that go to the heart of the jury's role: to weigh the relative credibility of witnesses in a case that turned almost entirely on whose version of events the jury found more credible. The jury's duty to resolve factual questions is severely impaired when it improperly receives information that besmirches the defendants' character. [United States v. Hall, 85 F.3d 367, 371 (C.A.8, 1996).]

Similarly, in hearing that defendants were members of an allegedly violent and racist unit, the juries' ability to resolve the factual questions before them may have been severely

impaired.

In relying on this extrinsic evidence regarding the STRESS unit, the juries would then have had an arguably good reason, but a legally impermissible one, to accept the emotionally charged account given by the film Malcolm X of the brutality of white **240 police officers. [FN24] Moreover, by convicting defendants, the juries may have believed they were avoiding a possible riot in the City of Detroit. Considering all these factors, we believe that there is a real and substantial possibility that these external influences together could have affected the juries' verdicts. [FN25]

FN24. This extrinsic evidence regarding defendants participation in STRESS would be particularly unfair to defendant Budzyn, because not only was there no testimony regarding his participation introduced at trial, but he was apparently never a member.

FN25. We do not express an opinion regarding whether any one of these extraneous influences would have been adequate by itself to create a real and substantial possibility that the juries' verdicts could have been affected.

*101 C. Harmless Error Analysis

Because defendants have carried their initial burden, we must decide whether any error was harmless beyond a reasonable doubt. There is no dispute that the extrinsic evidence was not duplicative of other properly admitted evidence for either defendant. Hence, we must determine whether the evidence against defendants was overwhelming. See Hughes, supra at 701. We believe that these extraneous influences were harmless for defendant Nevers in light of the overwhelming evidence of his guilt, but that the errors do require reversal for defendant Budzyn because the evidence against him was not overwhelming.

In the Nevers' trial, the four EMS witnesses, who had no apparent motive to lie, provided interlocking testimony that Nevers repeatedly bludgeoned Malice Green in the head with his heavy police flashlight while Green was dazed and not offering significant resistance. [FN26] The medical testimony of the **241 injuries to Green's head also substantiated this testimony. The people have proven that

there was unimpeachable, *103 compelling evidence that defendant Nevers harbored, at the very least, an unjustified intent to commit great bodily harm against Green. Thus, under Hughes, the extraneous influences were harmless. Consequently, we affirm the Court of Appeals decision to affirm defendant Nevers' conviction.

FN26. Martinez and Lewis arrived at the scene at the same time. Martinez testified that Nevers hit Green while Green was dangling out of the vehicle:

> Q. Could you see any injury on Malice Green?
> A. Just all the blood flow coming from his head.
> Q. Could you describe that for us?
> A. Just that he pointed towards more of a downward position towards the street and all the blood was just coming off of his head in a big puddle outside of his car.
>
> * * * * * *
>
> Q. What is the next thing that happens?
> A. [Nevers is] still ordering [Green] to open his hands and hold still and, you know, Malice Green was still moving around and his hair was flicking back at the blood splashing.
> Q. And then what happened?
> A. Then Mr. Nevers just reached over and had him like this telling him to hold still and he didn't hold still and he just, crack, crack.
> Q. Now you've indicated that he, after that he starts to hit him in the head with the flashlight; is that correct?

A. Correct.

* * * * * *

A. At that point [Sergeant Douglas] told Officer Nevers to take it easy. Said, take it easy, Larry.

* * * * * *

Q. After that remark was made, what did Defendant Nevers do?
A. As I say, still holding on to him, was still hitting him. Then he gave two more quick flicks with the flashlight.
Q. Where did he hit Malice Green with those next two?
A. In the head again.
Similarly, Lewis noted that "[Green] was covered with blood ... [h]is entire face, his hair appeared to be soaked with it, and on the ground," and that Nevers hit him anyway: Q. Now, when you walk up and you are confronted with this sight, do you say anything?
A. I asked him what happened

* * * * * *

... and he said, I hit him. And if he doesn't quit it, I'm gonna hit him again.
Q. What's the very next thing you recall happening?
A. The officer told him to be still, don't move, and he hit him twice on the head with the flashlight.

* * * * * *

Q. Were these two blows like one right after the other?

A. Yes, sir. Two, you know, rapping motions.
Q. Where in the head did he strike him, if you can tell us?
A. In the forehead around the scalp area.

* * * * * *

Q. All right. Then what happened?
A. He told him to be still and not to move again, and Malice Green didn't, so he hit him on the head again.
The other two EMS witnesses who arrived soon after confirmed this testimony. Walsh explained that "[Green] was covered in blood," noting that "[h]is shirt all the way up to the chest was totally covered in blood" when Nevers struck him with his flashlight. The top three or four inches of the flashlight was covered with blood. He further testified that "[Nevers] told [Green] to drop what he had in his hand [and] he struck him once in the back of the head." Hardy, who said that Green "had blood totally across his forehead, some coming down his face on the side," testified that Nevers was striking Green:
Q. Now, you said that you saw [Green] being struck. Can you indicate the manner that you saw him being struck at the time when you were standing right near the tire or bumper of the civilian car?
A. They weren't as rapid as the first ones that I had seen.
Q. As you were getting out of you rig?
A. Yes.
Q. Demonstrate, please, how they are.
A. They were like, you know, had more like power to them. Not as much speed.
Q. Not as much speed as the early ones?
A. As the early ones.
Q. Did they have some force behind them? A. Yes.

In Budzyn's trial, however, we believe that the evidence against defendant Budzyn, particularly considering he was convicted of second-degree murder, was not overwhelming. The evidence against him was fundamentally *104 weaker than the evidence against Nevers for three reasons.

First, of the three civilian witnesses who testified that defendant Budzyn hit Green in the head with his flashlight (Manuel Brown, Robert Hollins, and Teresa Pace), none was able to see the flashlight actually make contact with Green's head. [FN27] Unlike the EMS witnesses, they did not have a direct view of the blows. Instead, the three witnesses each inferred the fact that the flashlight hit Green in the head from the positions of the two men in the vehicle and from Budzyn's use of the flashlight to strike Green. Brown, who arguably gave the most damaging testimony of any witness, was the farthest witness away, standing fifteen feet from Fletcher, Hollins, Knox, and Pace. [FN28]

FN27. Brown clarified his earlier testimony that Budzyn hit Green in the head by explaining that he did not see any actual contact:

Q. You didn't see the contact but you saw the head go back, so you assumed there was contact there?

A. That's correct.

Q. So yesterday when you said you saw the contact you didn't really see it, you saw [Green's] head bouncing back?

A. That's correct.

Similarly, Hollins explained that he "couldn't see" where the blows actually hit from his vantage point ("I didn't see contact"), but, rather, he determined it from their positions.

Pace also testified that she believed that Budzyn hit Green on the head, but she was only inferring this point from their positions in the vehicle:

I couldn't see that much into the car. There wasn't much space left on his body he could have been hitting him but his head because of the way he was straddled on him.

Later, she admitted that she did not "see actual contact."

FN28. Brown explained that he only saw the blows through the "rear window" of the car while Budzyn and Green were wrestling in the front seat.

This testimony also contained some inconsistencies. The three key witnesses who testified that Budzyn ***105** hit Green on the head with his flashlight gave conflicting testimony on the nature of the blows that Budzyn

administered: Pace and Hollins testified that Budzyn lifted the flashlight above his head or shoulders and brought the flashlight down, while Brown insisted that the blows were horizontal, across his body, and that Budzyn did not lift the flashlight above his head. Also, Fletcher, who was only three to five feet away and was the closest of the witnesses to the incident, testified that Budzyn hit Green's clenched fist with the flashlight, but that he did not see Budzyn hit Green anywhere else on his body. [FN29]

FN29. Fletcher testified as follows:
Q. Mr. Fletcher, ... [Budzyn] only hits Mr. Green in the hand?
A. That's all.
Q. He never hit him anywhere else, did he?
A. I didn't see him hit him anywhere else.

Second, the civilian witnesses admitted that the altercation occurred after Green refused Budzyn's request that he turn over the incriminating evidence he held in his **242 hand. The civilian witnesses all agreed that Green never complied and that he struggled with Budzyn, [FN30]

although they said he never struck him or kicked him. [FN31] In fact, Fletcher testified that during the entire episode, Budzyn held onto Green's closed fist, *106 attempting to retrieve the contraband. This is a very different setting from the description the EMS medical technicians gave of the situation in which defendant Nevers was striking Green in the head. Because the exchange occurred in the confined context of the car with the car obscuring the witnesses' view, their testimony that Green did not kick Budzyn does not directly rebut his claim that Green did. [FN32] The medical evidence also does not necessarily contradict Budzyn's claims, because Nevers hit Green with significant force in the head and these blows may have been the cause of Green's extensive head injuries.

> FN30. Brown described Budzyn's interaction with Green as a "struggle" in which Budzyn was "trying to pull [Green's] hand away from his body." He said there would be "more blows, and then more wrestling, more blows and more wrestling." Fletcher testified that Green "wrestled back." Hollins testified that Green "scuffl[ed]" with Budzyn, trying to "get [Budzyn's] hand off him." Pace testified that Green's

legs were "moving in a kicking and struggling manner" and she admitted that she said in an earlier statement that Green was kicking and fighting with Budzyn.

FN31. The concurrence/dissent suggests that Budzyn "initiated" this exchange by beating Green on the hands. See Mallett, C.J., pp. 22, 27. We note that Budzyn, as a police officer, would have the right to use the necessary force to arrest a suspect who is holding cocaine. See People v. Doss, 406 Mich. 90, 101-102, 276 N.W.2d 9 (1979). The question, of course, is whether his use of force was criminal because it was unnecessary.

FN32. Defendant Budzyn testified that when Green closed his fist, Budzyn believed that he was holding narcotics. Defendant Budzyn said that he grabbed Green's right arm and that Green kicked him with his legs and that Green pulled Budzyn on top of him in the vehicle. Defendant Budzyn denied that he struck him at all with his flashlight or fist.

Third, in this credibility contest between Budzyn and these witnesses, the civilian witnesses all had either consumed alcohol or cocaine sometime before witnessing the exchange, [FN33] three of them were friends with Green (Fletcher, Hollins, and Pace), [FN34] and there *107 was some suggestion from their testimony that they had reason to

dislike these officers. [FN35] This fact is relevant because an inquiry into whether an error was harmless requires a focus on the nature of the error in light of the weight and strength of the other evidence. People v. Mateo, 453 Mich. 203, 215, 551 N.W.2d 891 (1996). Defendant Budzyn had searched Fletcher and Knox for weapons before defendant Nevers asked to see Malice Green's driver's license. Defendant Budzyn had also broken into Fletcher's home while Fletcher and Hollins among others were there, a week and a half before this incident, searching the house without warrant, and, on another occasion, had arrested two people outside the house. Thus, these witnesses were not in the same objective position as the EMS medical technicians, who, incidentally, did not offer any testimony regarding Budzyn's actions against Green because they had not yet arrived on the scene.

> FN33. Brown had earlier traveled to Fletcher's home, had used cocaine in the home, twice left the house with Knox to purchase cocaine and returned, and finally left the house before witnessing the altercation. Fletcher admitted that he had purchased and consumed alcoholic beverages that day. Hollins

had driven Knox and Pace to Fletcher's home, where Hollins smoked cocaine, drank some beer, left with Pace, before returning and witnessing the altercation. Knox admitted that he had smoked the cocaine at Fletcher's home that Brown had purchased for him. Finally, Pace admitted that while at Fletcher's home she had smoked cocaine.

FN34. Fletcher testified that he had known Green since they were children and that they were "very ... good friends." Hollins had known Green since Green's childhood and said he "kn[e]w him well." Pace had known Green for several months before this incident and said that they were friends.

FN35. They each referred to the officers as "Starsky and Hutch." Pace admitted that she was "always afraid" of Budzyn. Brown said that Nevers had previously arrested him and that he served jail time.

Even if the jury reasonably believed the testimony of the civilian witnesses, they still might not have concluded that Budzyn was guilty of second-degree murder. The question whether Budzyn's unnecessary use of **243 force as described by the civilian witnesses would be second-degree murder or manslaughter is an issue for the jury. We do not believe that the only, possible reasonable conclusion to draw from this evidence is that it established beyond a reasonable

doubt that he harbored an intent to kill, an intent to do great bodily harm, or to commit an act in wanton and wilful disregard that the likelihood that the natural *108 tendency of his conduct was to cause death or great bodily harm. In contrast, the testimony from the EMS medical technicians against Nevers made the conclusion inescapable that he was guilty of second-degree murder. We cannot say that the extraneous factors may not have affected the Budzyn jury's verdict. We, therefore, reverse his conviction and remand for a new trial.

CONCLUSION

We affirm defendant Nevers' conviction, but reverse defendant Budzyn's conviction and remand his case for a new trial. Thus, we affirm in part and reverse in part the decision of the Court of Appeals.

BRICKLEY, MICHAEL F. CAVANAGH and WEAVER, JJ., concurred with RILEY, J.

BOYLE, Justice (concurring in part and dissenting in part).

I agree with the majority's result and rationale with regard to defendant Nevers, [FN1] and its result in respect to defendant Budzyn. I write separately to explain my disagreement with certain aspects of the rationale in Budzyn.

> FN1. Neither the lead opinion nor the dissent addresses Nevers' motion for change of venue. I conclude that although the issue is closer than either opinion acknowledges, there is an insufficient showing to overcome the presumption that the community was able to seat a jury that could adhere to its oath. People v. Jendrzejewski, 455 Mich. 495, 566 N.W.2d 530 (1997).

First, despite differences of origin, history, class, education, race, ethnicity, sex, economic status, or educational level, it is a fundamental presumption of the judicial system that all Americans are equally capable of fairly discharging their public responsibilities. Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 ***109** L.Ed.2d 69 (1986). Therefore, I disagree with the analysis of the opinions of both Chief Justice Mallett and Justice Riley regarding the showing of the movie, Malcolm X, to the extent

that each employs assumptions about the predispositions of jurors. The system addresses the mind-set of jurors through voir dire, challenges for cause, and motions for change of venue, all of which require a demonstration of reasons why a prospective juror or a given community may be suspect. The approach is both aspirational and pragmatic. The judiciary has no competence to assess the cultural or psychological mind-set of a given jury and assess its reactions in light of its own assumptions. I also agree with the prosecution that the movie was not an extraneous communication, Tanner v. United States, 483 U.S. 107, 107 S.Ct. 2739, 97 L.Ed.2d 90 (1987), and find no error in this regard.

Second, I have reservations regarding the majority's resolution of the issue regarding juror knowledge during deliberation of contingency plans in the event the verdict was an acquittal. Prospective jurors were questioned regarding whether they would find Budzyn guilty in order to avoid a

riot, and the jury as seated was presumptively not vulnerable to such pressure. However, while this is not a situation in which community sentiment developed after the trial had begun, reports that freeways and businesses might be closed might have made real what during voir dire was purely hypothetical. While not free from doubt, [FN2] I would conclude that, although discussed during deliberations, *110 this information, standing alone, would not require reversal.

FN2. Case authority requires a showing of materiality to guilt or innocence. United States v. Bagnariol, 665 F.2d 877 (C.A.9, 1981).

However, I agree with the majority that the communication of incorrect information to the jurors during deliberations that defendant Budzyn was a member of STRESS was error requiring reversal.

While I do not evaluate the evidence precisely as does the majority, [FN3] I agree that the **244 evidence in Budzyn was not as strong as that in Nevers. Evaluated in the context of the evidence as a whole, the prejudicial

significance is that Budzyn's membership in STRESS indicated a propensity for abuse of young black males. By all accounts, Green had what turned out to be cocaine in his hands and refused to surrender it. Thus, Budzyn's initiation of force against Green was lawful, whichever version of the testimony is believed. The issue in Nevers' trial turned on whether the jury believed Nevers' testimony that the deceased was trying to take his gun, thus justifying the life-threatening response. The issue in Budzyn's trial, by contrast, was whether, and at what point, the lawful use of force became unreasonable.

> FN3. The fact that some witnesses knew Malice Green very well or that they all had consumed either alcohol or cocaine before witnessing the exchange goes to bias and capacity to observe, which are routine jury questions. If these witnesses had been those who saw Nevers' actions, for example, I doubt that the majority would find these factors relevant to the analysis. Moreover, these observations are inconsistent with the fact that only Brown testified about having seen a visible manifestation of the contact, that is, the movement of the decedent's head. Fletcher, the person closest to Green in terms of a

prior relationship, testified that he did not see Green struck anywhere except on his hands.

In substance, the jurors were told that Budzyn was a bad actor with a propensity for violence against young black men. Coupled with other evidence admitted at trial, this information could have persuaded the *111 jurors that Budzyn had a man-endangering state of mind. Thus, it is not only the fact, as the majority observes, that this evidence was relevant to besmirching the defendant's character, United States v. Hall, 85 F.3d 367, 371 (C.A.8, 1996), but the fact that this information supported the prosecution's theory that defendant was guilty of second-degree murder, United States v. Bruscino, 662 F.2d 450 (C.A.7, 1981), that is prejudicial.

Our responsibility is not to decide what we would have done or what we think the jury should have done. It is to hypothesize what the jury would have done had it not been exposed to the extrinsic information. Because there was substantial and real prejudice, United States ex rel Owen v.

McMann, 435 F.2d 813 (CA 2, 1970); United States v. Bagnariol, 665 F.2d 877 (C.A.9, 1981), I cannot conclude that the error was harmless beyond a reasonable doubt. I join in the opinion for reversal of defendant Budzyn's conviction of second-degree murder. I would affirm the conviction of defendant Nevers.

MALLETT, Chief Justice (concurring in part and dissenting in part).

Malice Green died en route to the hospital, as a result of blunt force trauma to the head [FN1] sustained while the defendant police officers attempted to arrest him. Following a joint trial before separate juries, defendants were found guilty of second-degree murder, M.C.L. § 750.317; M.S.A. § 28.549, and were sentenced to terms of eight to eighteen years (Budzyn) and twelve to twenty-five years (Nevers). The defendants appealed, first in the Court of Appeals and then in this Court, raising numerous claims of error. I *112 would affirm the convictions, finding that none of the issues

raised constitute error requiring reversal.

> FN1. Wayne County Medical Examiner autopsy report.

The difficulty of this Court's decision in this highly publicized and emotionally charged case was not caused by the emotional nature of the case, or by the publicity surrounding it. Nor was it caused by the infusion of race into some of the legal issues presented. [FN2] This case demanded careful examination because the legal questions presented are difficult and close.

> FN2. The facts of this case bear some similarities to the Los Angeles case in which the beating of black motorist Rodney King by white police officers was heavily broadcast throughout the country. Severe rioting followed the acquittals of the officers in that case. In the present case, the victim was black. The defendant police officers are white. Ten of the twelve Nevers jurors were black; eleven of the twelve Budzyn jurors were black.

The issues of greatest concern to both the majority and to myself relate to whether defendants were denied their right to a fair trial as a result of exposure to certain

extraneous influences. In particular, I am most **245 concerned with the jurors' exposure to the movie Malcolm X and to media accounts of contingency plans of suburban law enforcement in case of a riot. I will examine the issue of jury taint in detail. While I have also closely examined the other issues presented by the defendants, I will not discuss them in depth, finding them either lacking in merit or properly disposed of by the Court of Appeals.

I
Facts

The Court of Appeals unpublished opinion per curiam sets forth the following factual account of the case:

> *113 Defendants' convictions arise from events that occurred on the evening of November 5, 1992, in the City of Detroit, on the street outside of the storefront building apartment of Ralph Fletcher. Defendants were on duty as Detroit City Police Officers, in plain clothes, patrolling the area in an unmarked police car. They were keeping "loose surveillance" on a stolen Ford Tempo automobile in the area. Malice Green was driving Fletcher to his apartment in a similar model automobile, a red Topaz.
> Shortly after Green parked his vehicle in front of Fletcher's home, defendants drove by, stopped, backed up, and parked their police car behind Green's vehicle. At that time,

Theresa Pace, Robert Hollins, and Robert Knox were leaving Fletcher's apartment from the back door. Defendants initially focused on Green's vehicle to determine whether it was the stolen Tempo. They then spotted Knox, who appeared to run toward the back of Fletcher's house. Budzyn then pursued Knox and escorted him back to the area in front of the house. Fletcher and Green were standing beside Green's vehicle while defendant Nevers was standing beside the parked police car.

When Green was asked for his driver's license, he reentered his vehicle through the passenger side door and reached for the glove box. As he was sitting in the car sideways with his legs extending outside, Budzyn saw Green drop something, which appeared to be rock cocaine, and hold something in his right hand. When Green failed to obey Budzyn's orders to open his hand, Budzyn reached in and grabbed Green's right forearm. A struggle ensued.

According to Fletcher, Pace, Hollins, Knox, and Manuel Brown (who had also been stopped by defendants while walking in the area), Budzyn climbed on top of Green, straddled him as he laid back across the front seat, and hit him repeatedly with his flashlight. These witnesses further testified that Green did not appear to fight back, but continued to clench his right hand, despite Budzyn's repeated orders and the urging of the bystanders. Budzyn testified before his jury that he never hit or straddled Green. Nevers also testified to his separate jury that he never saw Budzyn hit Green, and although he heard some sounds of impact, *114 he denied knowing or believing that those sounds were caused by Budzyn striking Green.

Fletcher, Pace, Hollins, Knox, and Brown observed Budzyn strike Green with his flashlight on the hand or hands; however, not all of these witnesses could see whether Budzyn ever struck Green in the head or elsewhere. Fletcher, who was standing directly beside Green's car

approximately three to five feet away at the time, testified that he only saw Budzyn strike Green on the hand. Fletcher explained, however, that he had stepped away when Budzyn climbed further into the car and therefore was unable to see whether Budzyn ever hit Green in the head or not. Pace and Hollins, who stood a few yards away from Fletcher beside the front of the parked police car, only saw Budzyn hit Green in the hand as well. However, once Budzyn was on top of Green inside the car, they saw Budzyn swing his flashlight up over his shoulder and back down toward Green several times. They also testified that it appeared as though the blows were landing on top of Green's head, possibly his forehead, from the sounds of impact and the positions of Green and Budzyn. Hollins estimated that Budzyn landed at least six or seven such blows. Brown, who was standing at a **246 somewhat elevated position on the curb behind Green's car and approximately fifteen feet from the others, testified that he actually observed Budzyn hitting Green in the head with his flashlight approximately ten times.

At some point, Nevers walked over to the passenger side of Green's car and struck Green's clenched hand and knees with his flashlight. Nevers retrieved some rock cocaine from the car and told Fletcher and the other citizens nearby to leave, or that they were free to leave. As Nevers walked around to the driver's side door, Pace and Hollins walked to a parked truck and drove off. Fletcher testified that as he was walking toward his home, he turned and saw Nevers strike Green twice on the head with his flashlight from the open driver's side door, using a sweeping "golf swing." Brown saw Nevers strike Green several times from a position where it appeared to Brown as though the blows would have been landing on Green's head, although he was *115 unable to see whether there was actual contact. He estimated that Nevers hit Green approximately 15 times, including the initial hits on Green's hand and knuckles.

Nevers admitted hitting Green in the head with his flashlight a total of five or six times. He explained that he hit Green two or three times when Green grabbed the handle of his sidearm and then struck Green another two or three times when it appeared as though Green was holding a razor blade or knife in his hand.

Two EMS ambulance units from the Detroit Fire Department, designated as units "Impact 5" and "Medic 7," arrived on the scene. Each unit had two medical technicians who testified that Nevers repeatedly struck Green in the head with his flashlight as he lay across the front seat of the car with his head outside the driver's side door while ordering Green to open his hands and/or to be still. Technicians Albino Martinez and Mithym Lewis of the Impact 5 unit saw Nevers strike Green in the head a total of four times. Technician Scott Walsh of the Medic 7 unit saw Nevers strike Green with the flashlight once on the head, and later on the chest and abdomen. Technician Lee Hardy of the Medic 7 unit saw Nevers strike Green on the head about ten times and on the left hand four or five times. According to each technician, Green was bleeding heavily and covered with blood. He also was dazed or in a stupor, neither resisting nor responding to Nevers' commands, but only moaning or muttering incomplete words. Ultimately, Green was pulled from the car by Robert Lessnau, a uniformed police officer who had arrived on the scene. Green was handcuffed while he lay face down in the street in a pool of his own blood. Later, Green suffered a seizure while the medical technicians were rendering treatment and died during the transport to a hospital.

An autopsy was performed by Assistant Wayne County Medical Examiner Kalil Jiraki. There were nine cuts and a bruise on Green's scalp, and other bruises and cuts on the face and behind the ears. Jiraki opined that these wounds were caused by at least fourteen separate blows to the head. Most of the wounds were consistent with having been made

with a cylindrical instrument such as a flashlight. *116 Jiraki found no fracturing of the skull, and only minimal swelling of the brain. Although Jiraki found levels of cocaine in Green's blood consistent with being under the influence of cocaine at the time of death, he opined that those levels were too small to have any significance and had no bearing on Green's death at all.

Additional expert medical testimony was rendered from defense experts Dr. L.J. Dragovic, Chief Medical Examiner for Oakland County, Dr. Haresh Mirchandani, Chief Medical Examiner of Philadelphia, Dr. Lucy Rorke, as well as the prosecution's rebuttal witness, Dr. Michael Baden. All of the defense experts disagreed with Dr. Jiraki's opinion that the cause of death was blunt force trauma alone, without any effect from cocaine, and disagreed with his description of the mechanism or mechanisms of death as well. For example, Dr. Dragovic opined that the mechanism of death was seizure activity triggered as a result of the trauma upon the surface of Green's head while his brain was "wired **247 up" on cocaine. Dr. Mirchandani opined that Green died of a cardiac arrhythmia caused by a combination of cocaine use, physical exhaustion and trauma from the beating. Although there was some disagreement whether the head trauma alone might have caused death, all of the defense experts agreed that the beating at least played a role in Green's death. All of the experts, except Dr. Rorke, opined that Green would not have died at that time without the beating. Only Dr. Rorke suggested that Green might have died even without the beating. [FN3]

> FN3. I note at this juncture that defendants initially argued that the jury had not been properly instructed regarding causation. Since submitting their initial briefs, this Court decided People v. Tims, 449 Mich. 83, 534 N.W.2d 675 (1995), which held that the

causation element is satisfied if the defendant's actions are merely a cause, not necessarily the cause of death. Consequently, defendants have conceded this claim of instructional error.

Defendants were tried together but before separate juries. Robert Lessnau, who was also charged in this case, was granted a bench trial. Following selection of defendant Nevers jury, Nevers' motion for change of venue based upon pretrial publicity was denied. Ultimately, defendants' respective jurors found them guilty of second-degree murder, *117 and the trial court sentenced both defendants within the low range of their respective guideline sentence ranges---defendant Budzyn receiving an 8- to 18-year sentence and defendant Nevers receiving a 12- to 25-year sentence.... [Issued March 22, 1995 (Docket Nos. 170477-170478), Op. at ---- - ----.]

From the outset, the case engendered a flurry of media reports. This was due in part to the similarities between the case, involving white police officers and a detained black motorist, and the California acquittals of white Los Angeles police officers charged in the beating of black motorist Rodney King. Extensive media coverage continued through the trial, including reports speculating on contingency plans in place in the event of postverdict rioting. Jurors on both

Budzyn's and Nevers' panels were exposed to portions of these reports.

Near the end of the trial, during a two-day recess in the proceedings, the court provided videotape movies for the jurors' entertainment. One of the movies provided was Malcolm X, which depicts, in its opening credits, footage of the Rodney King beating with accompanying dialogue from a speech by Malcolm X. Both juries viewed at least part of the film. Defendants moved for a mistrial, arguing that this opening footage caused special prejudice and that the film was inappropriate for viewing in the context of this case. This motion was denied.

After the juries rendered their verdicts, the defendants filed motions for new trials, in part on the basis of the potential prejudicial effect on the jury of exposure to the movie Malcolm X and to media reports. This motion was also denied.

***118** The defendants appealed their convictions, raising

numerous issues including those relating to improper jury instructions, juror taint and bias, various improprieties on the part of the trial judge and the prosecution, and insufficiency of evidence. Finding no errors requiring reversal, the Court of Appeals affirmed the defendants' convictions. Unpublished opinion per curiam, issued March 12, 193 (Docket No. 93-0006671). This Court granted leave to appeal [FN4].

FN4. 451 Mich. 884, 549 N.W.2d 573 (1996).

II

Extraneous Influences; Jury Taint

Defendants who choose a jury trial have an absolute right to a fair and impartial jury. Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968); People v. Tyburski, 445 Mich. 606, 618, 518 N.W.2d 441 (1994). The defendants argue that they were denied this right by a combination of prejudicial publicity surrounding the case and

instances of extraneous influences on the jury during the trial. I will focus on what I believe to be the two most troubling of these claims: jury exposure to the movie Malcolm X and to media reports during the trial of **248 existing contingency plans in case of rioting after the verdict.

Before examining these claims of jury taint, I shall review the general principles and analysis applicable to determining claims of extraneous influences on jury verdicts.

*119 A

General Principles

Implicit in our jury system is an initial presumption of jury impartiality. See United States v. Ruggiero, 56 F.3d 647, 652 (C.A.5, 1995). Evidence that extrinsic factual matters tainted the jury's deliberations can defeat this initial presumption. Sheppard v. Maxwell, 384 U.S. 333, 351, 86 S.Ct. 1507,

1516, 16 L.Ed.2d 600 (1966); Ruggiero, supra at 652, quoting United States v. O'Keefe, 722 F.2d 1175, 1179 (C.A.5, 1983). While the use of postverdict juror affidavits or testimony to impeach a jury verdict is generally prohibited, an exception applies where the jury is exposed to "extraneous influences" that may have improperly influenced its deliberations. Tanner v. United States, 483 U.S. 107, 117, 107 S.Ct. 2739, 2745-46, 97 L.Ed.2d 90 (1987), and People v. Larry Smith, 106 Mich.App. 203, 211-212, 307 N.W.2d 441 (1981).

Thus, postverdict inquiries into extraneous influences on the jury must balance the defendant's right to a fair trial by an impartial jury with the long-established common-law rule prohibiting the admission of juror testimony to impeach a jury verdict. See Tanner, supra at 117-127, 107 S.Ct. at 2745- 51. The purposes underlying the general rule against impeachment of jury verdicts include promoting finality of jury verdicts, discouraging harassment of jurors, reducing

incentives for jury tampering, and encouraging free and open discussion among jurors. See Tanner at 119-120, 107 S.Ct. at 2746-48. The common-law rule and the exception for extraneous influences has been codified in federal law. [FN5] Michigan follows ***120** the federal rule. People v. Larry Smith, supra at 211-212, 307 N.W.2d 441.

> FN5. FRE 606(b) provides:
> [A] juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict ..., except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention .... Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes. [Emphasis supplied.]

Extraneous influences include publicity received and discussed in the jury room, consideration of evidence not admitted in court, and communications or other contact between jurors and third persons. In contrast, evidence of discussions among jurors, intimidation or harassment of one

juror by another, and other intrajury influences do not come within the exception and may not be used to impeach a verdict. United States v. Williams-Davis, 821 F.Supp. 727, 733 (D.D.C., 1993). In other words, while the exception allows the use of juror testimony or affidavits, the general rule still prohibits probing into the actual deliberative process. Thus, the jurors may testify regarding their exposure to these influences, but they may not relate how such exposure affected the deliberative process.

B
Burden-Shifting Analysis

Several state and federal cases are instructive regarding how prejudice resulting from extraneous influence may be proved and when such influences require reversal. A review of these cases reveals that *121 most courts employ a burden-shifting analysis. Once the defendant comes forward with evidence establishing the existence of an extraneous prejudicial influence, the burden shifts to the government to

rebut the presumption of prejudice by showing that the extraneous influence was harmless error. I agree with and would adopt this two-part analysis. Thus, as will be more fully set forth in this section, to determine whether the extraneous influences merit reversal, I would hold, as does the majority, that reviewing courts must first determine whether the defendant has **249 made the required threshold showing that the extraneous materials were prejudicial and must then examine whether the prosecution has shown that the jury's exposure to the materials was harmless.

1
Threshold Showing of Prejudice

Regarding the initial threshold showing required of the defendant, the United States Court of Appeals for the Second Circuit, in a seminal opinion by Judge Henry Friendly, stated that

> [t]he touchstone of decision ... is thus not the mere fact of infiltration of some molecules of extra-record matter, with the supposed consequences that the infiltrator becomes a "witness" and the confrontation clause automatically

applies, but the nature of what has been infiltrated and the probability of prejudice. [United States ex rel Owen v. McMann, 435 F.2d 813, 818 (C.A.2, 1970).]

Thus, generally, to impeach a verdict, the defendant must first establish the existence of the extraneous influence. Even with this burden met, however, the defendant will not be entitled to a new trial unless ***122** there is some further showing of prejudice. Williams-Davis, supra at 733; United States v. Boylan, 898 F.2d 230, 258 (C.A.1, 1990). [FN6]

> FN6. An exception applies to certain ex parte communications. For example, ex parte communications from judge to jury during deliberations are presumed prejudicial. People v. France, 436 Mich. 138, 461 N.W.2d 621 (1990).

The extraneous matters will not meet the initial threshold unless "there is a 'reasonable possibility' that such material could have affected the verdict." Williams-Davis, supra at 734, quoting United States v. Ortiz, 942 F.2d 903, 913 (C.A.5, 1991). Courts have articulated guidance, but have not created "bright line" rules for determining when the real and substantial possibility of prejudice standard is met.

There is no magic formula for deciding whether extrinsic

material disclosed in the jury room was reasonably prejudicial. The determination in each case in which such an issue is presented must be evaluated in light of its own unique circumstances. [United States v. Gaffney, 676 F.Supp. 1544, 1553 (M.D.Fla., 1987).]

The Ninth Circuit and other courts have set forth several factors relevant to determining whether extrinsic materials could reasonably have been prejudicial. For example, in State v. Watkins, 526 N.W.2d 638 (Minn.App., 1995), the court considered the following factors, among others, in estimating the probable prejudicial effect of racial slurs on the jury:(1) the nature and source of the prejudicial matter, (2) the number of jurors exposed to its influence, and (3) the likelihood that curative measures were effective in reducing the prejudice. [Id. at 641].

***123** The Ninth Circuit has identified similar factors, including: (1) whether the extrinsic material was actually received and if so how, (2) the length of time it was available to the jury, (3) the extent that the jurors discussed and considered it, (4) whether it was introduced before a verdict

was reached and if so at what point during the deliberations, and (5) the length of time the jury deliberates after exposure to the extrinsic material. [FN7] Regarding this last factor, if the jury was deliberating for a significant time before exposure to the extrinsic evidence and then quickly rendered a verdict after the exposure, the information likely affected the verdict. The Ninth Circuit does not consider any one factor as being determinative in any given case. Dickson v. Sullivan, 849 F.2d 403, 406 (C.A.9, 1988). [FN8]

> FN7. See Caro-Quintero at 1575; Marino v. Vasquez, 812 F2d 499, 506 (CA 9, 1987), citing Bayramoglu v. Estelle, 806 F.2d 880, 887 (C.A.9, 1986).

> FN8. Some of the cases from the Court of Appeals for the Ninth Circuit discuss the factors relevant to determining prejudice as part of the harmless error determination and some simply combine the threshold prejudice prong of the test with the harmless error prong. I would apply the relevant factors as part of the threshold inquiry because they are more applicable to determining the level of potential prejudice than to the harmless error inquiry.

2

Harmlessness of the Extrinsic Materials

Once the defendant has met the burden of coming forward with competent evidence regarding **250 prejudicial extraneous matters, the burden shifts to the state to prove that exposure to the extraneous influences was harmless error. Cases provide guidance regarding how the government may establish harmless error in this context. Exposure to extraneous prejudicial matters *124 may be deemed harmless if the extraneous material is merely duplicative of evidence introduced in open court, or if the other evidence amassed at trial was so overwhelming that the jury would have reached the same result even without the extraneous material. Caro-Quintero, supra at 1574; Hughes v. Borg, 898 F.2d 695, 700 (C.A.9, 1990). The Court of Appeals for the Ninth Circuit has stated that such a determination of overwhelming evidence will rebut the presumption of prejudice in this context when "the other evidence adduced at trial [is] 'so overwhelming that "we can say, with fair assurance, after pondering all that happened without stripping the erroneous

action from the whole, that the judgment was not substantially swayed by the error." ' " Caro-Quintero, supra at 1575, quoting Hughes, supra at 701. We believe this standard is generally appropriate and essentially comports with the standard for harmless error applicable to errors of constitutional magnitude as adopted by this Court in People v. Anderson (After Remand), 446 Mich. 392, 521 N.W.2d 538 (1994). [FN9] Consequently, exposure to prejudicial extrinsic materials is harmless error if the reviewing court may conclude, beyond a reasonable doubt, that the other evidence adduced at trial is so overwhelming that there is no real and substantial possibility that the challenged evidence contributed to the conviction. Anderson, supra at 406, 521 N.W.2d 538.

> FN9. The asserted error is of constitutional magnitude. Outside influences are not subject to cross-examination and cannot be confronted by the defendant. Consequently, this type of claimed error directly affects the right to a fair trial and must be evaluated under the stringent beyond a reasonable doubt standard.

*125 With these guiding principles in mind, I shall consider whether the extraneous influences asserted require reversal of the convictions.

III
Malcolm X

I will first examine the movie Malcolm X. The first inquiry is whether the defendants have met their threshold burden by bringing forward competent evidence of a prejudicial extraneous influence. Defendants rely, in part, on sealed affidavits of four jurors [FN10] to establish that the jurors had watched the movie Malcolm X during a recess. I do not question the limited use of the signed affidavits to show exposure to this extraneous influence. I also note that existence of this influence was established on the record in the motion for mistrial.

> FN10. One Budzyn juror and two Nevers jurors submitted signed affidavits. An additional Nevers juror prepared, but did not sign, a statement.

As noted earlier, beyond showing exposure to an

extraneous influence, the defendants, absent an unauthorized ex parte communication, [FN11] must make a showing of prejudice reverberating from the extraneous information. The test for determining whether the threshold level of prejudice is met is whether defendants have established a real and substantial possibility that the extraneous matter could have affected the verdict.

> FN11. I would reject the defendants' argument that because the court provided the video tapes from which the jurors made their choice, the movie should be viewed as an ex parte communication from the judge to the jury, thus warranting a presumption of prejudice. People v. France, at 167 n. 6, 461 N.W.2d at 634 n. 6 supra. Defendants' conclusion in this regard goes beyond the holding in France.

***126** The first factor in this threshold inquiry is the nature and source of the extraneous material. The defendants focus their claim of prejudice resulting from the showing of Malcolm X on the opening footage of the movie. In an attempt to make his movie more provocative, producer-director Spike Lee presents opening footage of the beating of

motorist Rodney King by Los Angeles police officers against the backdrop of a burning American flag. Along with these images, the viewer hears words from a speech by Malcolm X. Virtually every person in America had been exposed to the footage detailing **251 the brutal beating given Mr. King by members of the Los Angeles Police Department. While it was unfortunate that the jurors were perhaps once again confronted with this footage, is it the defendants' position that the jurors became inflamed and were engulfed by emotion and thus rendered incapable of rendering a fair verdict? The possibility that a few police officers will absolutely violate department rules and procedures is never far from the minds of African- Americans, no matter their station in life. The presence of racism in any community can, and sometimes does, cause American citizens to react emotionally and render less than clear judgment. But there is no reasonable probability that the Rodney King footage affected the jurors in this case.

Racism has not and will not quell the desire of African-Americans to fully exercise all the rights and responsibilities associated with democracy. If this were not true, then the four-hundred-year-old struggle for freedom and economic opportunity would have been abandoned long ago. The defendants have not *127 established that the picture of one black man being beaten by police officers could reasonably have prevented the jurors from rendering a fair verdict.

The words of Malcolm X in the opening sequence are indeed provocative. [FN12] But when these words are taken in the context of the effect of the overall message of the movie, their effect is greatly lessened. [FN13] Please be clear, I do not dismiss the power of words. I do dismiss the conclusion that there is a real and substantial possibility that conscientious jurors watching this movie, shown during a recess purely for entertainment purposes, would have allowed it to affect their verdict. [FN14]

FN12. For example:
Brothers and Sisters, I am here to tell you that I charge the white man, I charge the white man with being the greatest murderer on earth.... I charge him with being the greatest kidnapper on earth, I charge him with being the greatest murderer on earth.... We didn't see any democracy on the streets of Harlem ... on the streets of Detroit.... We've experienced only the American nightmare.

FN13. I note that the Nevers jurors did not watch the entire movie, but only watched it for approximately forty-five minutes. Another Nevers juror indicated that they watched the entire first cassette, but did not watch the second cassette. Although the Nevers jurors did not view the entire movie, they viewed enough of it to have a flavor of its message and to place the opening sequence in context.

FN14. In evaluating the nature of this extraneous influence and its likely effect on these jurors, I cannot ignore the fact that most of the jurors were African-Americans. These jurors were undoubtedly intimately and personally aware of the problems in this country brought to the forefront by the Rodney King incident. If they could set aside their personal knowledge of police brutality, they could surely set aside any potential emotional effect of the movie.

Regarding the nature and source of this extraneous influence, the defendants emphasize that the movie was supplied by the court; this factor alone is not determinative.

While this fact does tend to bolster the *128 movie's potential prejudicial effect, the nature of this particular extraneous influence weighs heavily against a finding of prejudice. The movie was chosen by the jurors from three others made available to them purely for purposes of entertainment. [FN15] The jurors should be credited with enough sophistication to separate entertainment from evidence.

FN15. Other choices included Body Guard, Leap of Faith, and Scent of a Woman.

Another important factor relevant to the threshold inquiry is the timing of the jurors' exposure to the movie. The jurors were not exposed to this extraneous influence during deliberations, but during a two-day recess near the end of the trial. Extraneous influences during the deliberative process are deemed more prejudicial than those finding their way to the jury earlier in the trial. This fact distinguishes this case from others finding that juror exposure to a movie of a potentially prejudicial nature during deliberations required reversal. See Seekers v. State, 35 Ala.App. 40, 44 So 2d 628

(1949); Gonzales v. State, 593 S.W.2d 288 (Tenn., 1980).

[FN16]

FN16. Other cases requiring reversal on grounds of juror exposure to a movie before deliberations are also distinguishable. In State v. RW, 200 N.J.Super. 560, 491 A.2d 1304 (1985), the court refused to instruct jurors near the beginning of the trial not to watch a movie airing on television that depicted child abuse. The court reversed the child sexual abuse convictions, finding that the movie at least combined with other errors to require a new trial. Significant to the court's analysis was the fact that the only evidence of defendant's guilt was the testimony of the three-year-old child and that the trial judge could have avoided any potential prejudice by instructing the jurors to avoid watching the movie.

In State v. Blanks, 479 N.W.2d 601 (Iowa App., 1991), the court focused on parallels between the plot of the movie Gorillas in the Mist with the facts of the case before it. The prosecutor referred to the movie in closing argument. Because of these parallels, and the potential that reference to the movie could be interpreted as having racial overtones by the jury, the court held that a new trial was required.

A review of these, and other, "movie" cases reveals certain trends in the decisions. See 33 ALR2d 847, Permitting jurors to attend theater or the like during course of criminal trial as ground for mistrial, new trial, or reversal. The early cases are characterized by a reluctance by courts to "speculate" regarding prejudice. If there were any chance that the movie might have influenced the verdict at all, reversal was deemed required. Later cases, however, reveal a more searching analysis regarding whether the movie

was likely to have a prejudicial effect in light of all of the circumstances. Factors relevant to the inquiry appear to be: (1) whether the jury viewed the movie apart from others, thus lessening the chance of interaction and potential influence from outside persons, (2) whether the movie was viewed during deliberations, (3) the similarity of the film to the case and the potential for prejudice resulting from any similarities, and (4) the weight of the evidence against the defendant.

These factors weigh against ordering a new trial in this case. The jurors viewed the movie alone, separated from outside persons. Further, they did not view it during deliberations. Apart from the brief opening sequence, and some isolated historical depictions of police brutality, the overall plot and message of the movie bore no similarities to the facts in the case. Finally, the weight of evidence against the defendants was substantial.

**252 *129 Other factors relevant to the initial threshold inquiry have not been argued or sufficiently developed by the defendants in order to support their burden. Regarding the number of jurors exposed to the movie, while the affidavits seem to indicate that every member of both juries was present in the room during the playing of at least part of the movie, they do not clearly indicate that every member actually viewed it. Regarding discussion of the extraneous material

among the jurors, the defendants have not established that the movie was extensively discussed. Finally, the timing of exposure and the length of deliberation do not support a conclusion that the movie affected the verdict. As already noted, those jurors who watched the movie did so well before deliberations began, and before being charged by the court to consider only the evidence before them, free ***130** from prejudice or sympathy. [FN17] Further, both juries deliberated for a substantial period, more than a week, before rendering a guilty verdict. Consequently, rather than supporting their threshold burden, the timing and length of deliberation here supports the conclusion that the movie did not likely play a role in the verdicts.

> FN17. It is also noteworthy that the trial court, throughout the trial, repeatedly admonished the jury to view only the evidence admitted at trial and took scrupulous care to remind them to avoid outside influences.

Given the unique facts of this case, we determine that defendants have failed to meet the threshold burden of establishing a real and substantial possibility that the viewing

of the movie Malcolm X affected the verdicts. Virtually every factor courts have identified as relevant weighs against a finding that the movie could reasonably have affected the verdicts.

I would further find that, even if the defendants had met their initial burden, a reversal is not required here because it can be said, beyond a reasonable doubt, that the other evidence adduced at trial was so overwhelming that there is no real and substantial possibility that viewing the movie might have contributed to the convictions. Anderson, supra. In this regard, I agree with the Court of Appeals conclusion that reversal, on the basis of the showing of Malcolm X, was not required. The Court of Appeals explained that reversal was not required

> given the overwhelming evidence against defendants in favor of the convictions. By all eyewitnesses' accounts, both defendants struck Malice Green repeatedly with their flashlights while he offered little, if no, resistance. Fletcher, Pace, Hollins, Knox and Brown testified that Budzyn initiated the beating by repeatedly striking Green with his flashlight **131** on the hands. Despite their inability to directly observe Budzyn **253** striking Green

> in the head, these witnesses testified that Budzyn was on top of Green inside the car and was swinging his flashlight over his shoulder down toward Green. Based on this position and the sounds, it appeared to them that Budzyn's blows impacted Green's head. Furthermore, Brown actually saw Budzyn strike Green in the head several times. In addition to some of these witnesses, the testimony from the four medical technicians established that Nevers struck several blows while Green was covered in blood.
> Moreover, the number of cuts and bruises that Green sustained exceeded the number of blows to which defendants admitted rendering. Budzyn denied hitting Green at all, whereas Nevers admitted hitting Green five or six times. However, the medical examiner found nine cuts on Green's scalp and other cuts and bruises on his face and behind the ears. In all, the medical examiner opined that Green sustained at least fourteen separate blows to his head. Along with the testimony from civilian and medical eyewitnesses, the obvious implication is that either or both defendants were minimizing the amount of force utilized in arresting Green in order to justify the murder. Thus, in light of this evidence, we cannot say that the jury convicted defendants on the basis of emotions that could have arisen from watching the videotape. The evidence clearly supports the verdicts of second-degree murder. [Slip op at 247.]

I respectfully disagree with the majority's conclusion that the evidence supporting second-degree murder against defendant Budzyn was not overwhelming. As noted by the Court of Appeals, and supported in the record, all five of the eyewitnesses, Fletcher, Pace, Hollins, Brown, and Knox,

testified that Budzyn initiated the beating by repeatedly striking Green on the hands. Witnesses Pace and Hollins, who observed the scene from essentially the same vantage point, saw Budzyn swinging his flashlight over his shoulder down toward Green in the direction of Green's head. ***132** They both testified that on the basis of the positioning of Budzyn and Green, and the sound of impact, it appeared that Budzyn was repeatedly hitting Green on the head with his flashlight. [FN18] ****254** Further, eyewitness ***133** Brown, who observed the scene from a different vantage point, standing on the curb at a slight elevation and to the rear of the car, testified that he actually ***134** saw Budzyn strike Green on the head with the flashlight several times. [FN19] Witness Fletcher's testimony, which did not indicate that Budzyn's blows appeared to land on Green's head, was not necessarily inconsistent with the conclusion of the other witnesses. Fletcher explained that he did not see everything that transpired after observing the blows to Green's hand and after

Budzyn positioned himself further into the car on top of Green because Officer Budzyn was positioned in a way that obstructed his view for a period. [FN20]

FN18. For example, Theresa Pace testified as follows:

> Q. All right. When you say that Defendant Budzyn goes over, grabs his hand, starts beating it, he then, you said, straddled him, or words to that effect; is that right?
> A. Yes.
>
> * * * * * *
>
> Q. And when he actually straddles him, is he in a face to face position with Malice Green?
> A. Yes, he is.
> Q. Where do you see him striking him at this point with the flashlight?
> A. I couldn't see that much into the car. There wasn't much space left on his body he could have been hitting him but his head because of the way he was straddled on him.
>
> * * * * * *
>
> Q. When he began to hit him, hit Malice Green in the knuckles, can you show us what motion he used to do that as best you can?
> A. Like this.
> Q. And you are indicating an up and down motion?
> A. Yes.
> Q. Over the hand; is that right?
> A. Yes.
> Q. He straddles him; is that right?

A. Yes, he does.
Q. Describe what you see then.
A. The flashlight is still in his hand, he's like this (indicating) hitting Malice.
Q. And you are indicating an overcoming up and down motion?
A. Yes, sir.
Q. Over your shoulder; is that right?
A. Yes.

* * * * * *

Q. Can you tell us what part, based on where you were at and what you saw, what part of Malice Green's person would have been underneath this light ...
A. His forehead.
Q. ... as it came down? Can you actually see the contact being made?
A. I couldn't actually see it but there was nothing left of him elsewhere to hit.
Q. Could you hear the blows being struck?
A. Yes, you could hear 'em.

* * * * * *

Q. Did you see him, when Defendant Budzyn came over and grabbed his hand and started to straddle him, did you see him fighting Defendant Budzyn in the sense of punching him or kicking him or biting him or scratching him or whatever?
A. No.
Similarly, Mr. Hollins testified:
Q. All right. Now, you initially saw the flashlight hitting him in the hand; is that correct?
A. Yes.

Q. Could you see where it was hitting him at this point?
A. I couldn't see actually where contact was made, no. I just could see that it was---had to be above the shoulders.

* * * * * *

Q. ... given the position that Officer Budzyn was at over Malice Green, what part of him would he have been striking?
Mr. Goldpaugh: The question has been asked and answered, your Honor.
The Court: I'll take it again.
By Mr. Baker:
Q. What part of him would he have been striking given the way they were positioned from what you saw?
A. From what I saw it would have to be the head area.
Q. Could you hear it?
A. Could I hear it?
Q. Yes.
A. Yes, I could hear it making contact.

FN19. Mr. Brown testified as follows:
Q. Now, what did you see Officer Budzyn do with this flashlight?
A. Began to strike Malice Green in the head.
Q. Now, explain, please, were you on a curb?
A. Yes, I was.
Q. And were you elevated looking down into the car?
A. Yes, I was.
Q. And from where you were standing, how was it that you could see into the car? What part of the car could you see into?
A. Through the rear window.

Q. And could you also see into the side passenger door?
A. Yes, I could.
Q. Was it open at that time?
A. Yes, it was.
Q. How was it that you saw Officer Budzyn striking Malice Green in the head?
A. Because the interior dome light was on, plus the lighting on the car, on the unmarked car behind it.
Q. Where was Malice Green's head when you saw him being struck?
A. In between the seats.
Q. When you say, in between the seat, you mean between the front passenger's seat and the front driver seat?
A. From where I was looking, they had like split, the seats, with a gap in between 'em, and that's where his head was.

FN20. Relevant portions of Mr. Fletcher's testimony are as follows:
Q. ... He only hits Mr. Green in the hand?
A. That's all.
Q. He never hit him anywhere else, did he?
A. I didn't see him hit him anywhere else.
Q. Now, you also, in response and I don't remember which attorney it was, to one of the---I think it was Mr. Batchelor, I think, and he was talking about when you could no longer see the hands of Malice Green and see Officer Budzyn was because he had his back to you in the car?
A. Yes, ma'am.
Q. And when this happened you could not see what was going on inside of the car; is that right?
A. Yes, ma'am.

Q. So you didn't actually see the strikes hitting his hands at that point, did you?
A. No, ma'am.
Q. Did you see the flashlight going up at that time?
A. No, ma'am. I had backed away then.
Q. When your view---I understand that you testified that most of the time you could see his hands, I mean his flashlight actually striking the hands of Malice Green?
A. Yeah.
Q. When your view was obstructed when you backed up, could you see the exact portion of the body that the flashlight was landing?
A. No, ma'am.
Q. Could you hear that it was landing on some part of his body?
A. Yes, I could.
Q. And, again, just so we are all clear that is during the time when your view was obstructed because he was directly in front of you?
A. Yes, ma'am.

*135 I cannot help but conclude that the evidence concerning Budzyn's actions was overwhelming to support the verdict of second-degree murder. This conclusion would not be different even if, as the majority suggests, the injuries actually causing Green's death could have been inflicted solely by Nevers. While Budzyn's actions were perhaps less brutal than Nevers', he initiated the encounter **255 with

Green that ultimately resulted in Green's death. His actions went far beyond the level of force necessary in the situation. *136 Rather than calling his partner to assist him in pulling Mr. Green out of the car and handcuffing him, Officer Budzyn exerted excessive force in attempting to get Green to open his clenched fist. Further, Budzyn did not step in to stop Nevers' beating of Green when Nevers continued the beating with actions that were clearly an unjustified and brutal show of force.

The majority attempts to discount the evidence against Budzyn by questioning the credibility of the eyewitnesses. It may or may not be true that because each of these witnesses had been implicated in criminal activity, or because they may have smoked cocaine or consumed alcohol before witnessing the events leading up to Green's death, they were less credible than the EMS witnesses who testified against defendant Nevers. This Court, however, is not in a position to judge the

relative credibility of the witnesses against the two officers. The jurors heard the testimony from eyewitnesses Pace, Hollins, Brown, and Fletcher, all of whom were subjected to thorough cross-examination, and evidently found it to be credible. [FN21]

> FN21. I further note that whether the evidence may also have supported a lesser verdict is not the question before us.

IV
Media Reports

I will next turn my attention to the jurors' exposure to media reports concerning contingency plans in case of postverdict rioting. Defendants argue that exposure to these reports tainted their juries. Only two of the four juror affidavits offered by the defendants mention exposure to this information; one from ***137** the Nevers panel and one from the Budzyn panel. The Nevers juror recounted exposure to a news report regarding possible rioting and freeway closings while home overnight during the deliberation period. The

Budzyn juror stated that during deliberations someone had mentioned news reports that the city was preparing for possible rioting and that businesses and freeways might be closed if defendants were acquitted.

Initially, we note that, unlike the viewing of Malcolm X, exposure to these reports occurred during the deliberation period. Consequently, the timing of this exposure is more troubling because the sanctity of jury deliberations is more directly implicated. However, virtually every other aspect of this particular extraneous influence is less troublesome than the viewing of Malcolm X.

In contrast to the affidavit statements regarding the movie, which arguably support a finding of exposure by virtually every juror on both panels, affidavit statements regarding media reports do not indicate this degree of exposure. The Budzyn affidavit is equivocal regarding how many on that panel were exposed. It relates that someone mentioned media reports, but does not indicate how many on

the panel heard the comment, or whether only the writer of the affidavit heard it. The affidavit from the Nevers juror attests to that juror's own exposure, but says nothing about whether the juror discussed the reports with other jurors or whether other members of the panel had also heard the reports. From the affidavits, one can only be certain of exposure by one Budzyn juror and at least two Nevers jurors. Consequently, defendants have not produced sufficient evidence that either ***138** panel, in its entirety, was tainted by the reports. While it is not necessary to a finding of prejudice that the entire panel be exposed, the number of jurors exposed to the prejudicial information is relevant to determining the possibility of prejudice. Watkins, supra. The lack of proof of extensive juror exposure to these reports weighs against a new trial. See United States v. Ruggiero, supra (holding that one juror's exposure to extraneous information concerning prior criminal acts of the defendant, which she did not disclose to the other jurors before they

rendered a verdict, did not merit a new trial).

Even if defendants had shown extensive juror exposure, I would not conclude that there was a real and substantial possibility that it affected the verdict. Unlike other **256 cases finding taint from exposure to media reports, [FN22] the information conveyed in these reports did not relate directly to a material aspect of the case. Caro-Quintero at 1574. "Reviewing courts will not disturb jury verdicts on appeal when extraneous information relates only to issues not material to the guilt or innocence of the defendant." United States v. Bagnariol, supra at 887. Information in the media reports was not material to the defendants' guilt or innocence.

> FN22. An example of such a case is United States v. Bruscino, 662 F.2d 450, 461 (C.A.7, 1981), in which a juror read, and cut out, an article reporting a codefendant's guilty plea to a charge of conspiracy. The juror stated that she cut the article out of the paper and took it to court so the other jurors could read it. Because the information contained in the article supported the government's theory concerning the defendant's guilt, exposure to the article mandated a new trial.

> Typical news accounts deemed prejudicial are those with "massively inflammatory revelations of prior felony convictions, past criminal conduct [, or] admitted and alleged improprieties...." United States v. Solomon, 422 F.2d 1110, 1118 (C.A.7, 1970).

*139 Further, I cannot reasonably conclude that the jurors would allow fear of potential rioting to sway them to convict. While this is, of course, a possibility, it is not a necessary, or even a reasonable, conclusion. It must be assumed that most, if not all, of the jurors were aware of the Los Angeles rioting occurring after the Rodney King acquittals. Given this reality, exposure to reports that officials were prepared and had contingency plans in place may have had the opposite effect and lessened any pressure to convict. Again, on the basis of the juror affidavits, I am not convinced that fear of rioting had a real and substantial possibility of shaking the jurors' resolve to abide by the judge's instructions that they should decide the case only on the evidence and not let sympathy or prejudice influence their decisions.

Finally, even if the defendants had met their burden

of showing that exposure to the media reports reasonably affected the verdict, a new trial would not be warranted because of the overwhelming evidence against the defendants, as explained earlier in this opinion.

V

Juror Deliberations Involving STRESS

I disagree with the majority's conclusions regarding the jurors' discussion of the Stop the Robberies Enjoy Safe Streets unit, and of their apparent belief that defendants had been members of that unit. Clearly, as indicated in voir dire questioning of potential jurors, the defendants were aware that STRESS was a potentially inflammatory topic and that the nature and existence of the unit was common knowledge among many of the potential jurors. In spite of this, defense *140 counsel made no effort to deal with the issue at trial and did not seek any cautionary instructions beyond the normal instruction given by the trial court that the jurors should consider only the evidence before them and that they should view this evidence without prejudice or sympathy.

The jurors' personal knowledge and life experiences as urban-dwelling Americans probably made inevitable a discussion of the wider problem of police brutality and specifically of the notorious STRESS unit. That their deliberations would include a discussion of STRESS was, perhaps, to be expected. That they might speculate and discuss their own knowledge or beliefs that one or both of the defendants had once been members of STRESS is also not surprising.

Can it be seriously argued that defendants are compromised because the acts of which they stand convicted invoked a discussion of the official lawlessness epitomized by the jurors' apparent understanding of STRESS? Police brutality was what this trial was about. Juror discussions about the history of police brutality, in their own home town, was a natural part of their deliberative process and should not be relied on by this Court in support of defendants' claims of error. [FN23]

FN23. In contrast, the movie Malcolm X and the media reports of riot contingency plans were clearly extraneous to the issues in this case.

VI
Other Issues

While the defendants raise other extraneous influences that they believe, in combination **257 with the issues discussed, tainted the jury, I find them to be substantially less troubling than those I have discussed. *141 Further, I am unpersuaded that a combination of factors denied the defendants a fair trial by an impartial jury. A careful review of the record assures that the trial judge generally did an exemplary job of ensuring a fair trial for the defendants. A review of the voir dire transcripts, particularly those portions concerning seated jurors, also assures that the jurors on both panels were unbiased. [FN24] The defendants have failed to convince me that any extraneous influences rose to a level of prejudice sufficient to taint the jury panels.

FN24. For example, we note the following statements during voir dire made by some of the seated jurors, detailing their

exposure and reactions to media reports:

> No, I don't read the newspaper, very seldom, and like I say, a person is innocent until proven guilty. That's my strong belief and I [would] fight for his right to have it so.
>
> * * * * * *
>
> I cannot believe any of it right now because I have not heard---it's like trying to find out the truth to a mathematical equation, okay? I have to actually work through the process in order to get to a conclusion. I cannot just draw an opinion based on someone else's, whatever they, their opinions are. Follow me?
>
> * * * * * *
>
> Well, I read that police brutality killed this man. I don't know if it's true or not because the papers write anything, the news say anything, so it's hard to believe.... I didn't pay ... any attention.
>
> * * * * * *
>
> I was upset, I mean, by a death, I mean sure, but the opinion was more or less neutral, because I didn't know all the elements of the case, so---and if I was in any of those people's position, all I know, I would want a fair trial.

Finally, I have carefully reviewed the defendants' numerous other claims, and find that some are lacking ***142** in merit and that others were properly dealt with by the Court

of Appeals. Consequently, I will not discuss them further.

VII
Conclusion

All citizens must fiercely guard the processes and institutions that ensure our liberty. The chosen occupation of these defendants is one that plays a crucial role in protecting the life and liberty of all citizens. I appreciate the difficulty faced by those who seek to keep the peace on our city streets. I recognize that the great majority of police officers conscientiously perform their duties with the utmost regard for the rights of those they seek to protect. However, when police officers cross over the line from keepers of the peace and protectors of lives to aggressors, exerting force far beyond that required in the given situation, the law must treat them no differently than other defendants.

The right to a fair trial by an impartial jury is of paramount importance in securing our liberty. Consequently, this Court has properly taken very seriously the defendants'

claims that their juries' exposure to extraneous influences denied them this right. After careful review however, I am left with the distinct and firm impression that the defendants received a fair trial. [FN25] The potential prejudice from the asserted influences is real. However, it does not rise to a level sufficient to persuade me of a real and substantial possibility that the verdicts were affected. Additionally, ***143** given the overwhelming evidence supporting the verdicts, it can be said, beyond a reasonable doubt, that these influences did not contribute to the verdicts.

> FN25. While I recognize that the defendants' trial was not perfect, "[w]e require a fair trial, not a perfect trial." People v. Beach, 429 Mich. 450, 491, 418 N.W.2d 861 (1988).

For all the above reasons, I would affirm the Court of Appeals decision.

MARILYN J. KELLY, J., not participating.

Supreme Court, U.S.
FILED
MAY 14 1999
CLERK

No. 98-1665

In The

Supreme Court of the United States

GEORGE KILLINGER, Warden,

Petitioner,

v.

LARRY NEVERS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court should deny review of the decision of the Sixth Circuit Court of Appeals affirming the district court's issuance of a writ of habeas corpus, where the asserted error raised by Petitioner consists of the alleged misapplication of a rule of law that Petitioner concedes is properly stated, where Respondent would prevail under any applicable standard, and where the court of appeals correctly applied the standard in this context.

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OPINIONS BELOW

Respondent notes that the opinion of the United States Court of Appeals for the Sixth Circuit has been published as follows: *Nevers v. Killinger*, 169 F.3d 352 (6th Cir. 1999).

In addition, Respondent adds the opinion and order of the United States District Court for the Eastern District of Michigan, which is published as follows: *Nevers v. Killinger*, 990 F.Supp. 844 (E.D. Mich. 1997).

STATEMENT OF JURISDICTION

Respondent does not quarrel with Petitioner's right to seek review under 28 U.S.C. § 1254(1), or with the timeliness of its Petition for a Writ of Certiorari.

CONSTITUTIONAL PROVISIONS INVOLVED

Respondent does not quarrel with Petitioner's presentation of the constitutional provisions involved.

RESPONDENT'S STATEMENT OF THE CASE

Petitioner has accurately presented the procedural history and facts of the underlying case. The lone issue raised by Petitioner, however, revolves around the harmlessness of an error that Petitioner has consistently conceded constitutes federal constitutional error – i.e., a

series of extraneous influences upon the jury that convicted Respondent. Accordingly, Respondent sets forth herein additional facts regarding the nature of these extraneous influences.

In this case, Respondent's jury was exposed to numerous extrinsic influences throughout the trial. Respondent raised this issue under the Sixth and Fourteenth Amendments on direct appeal in the Michigan state courts. The Michigan Supreme Court held that three (3) extraneous influences in particular deprived Respondent of his constitutional rights: the jurors' viewing of the video *Malcolm X* during deliberations, the jurors' knowledge that the City of Detroit was bracing for a riot in the event of an acquittal, and the jurors' awareness that Respondent had been a member of the controversial STRESS (Stop The Robberies Enjoy Safe Streets) police unit. However, the Michigan Supreme Court reversed only the conviction of Walter Budzyn, Respondent's co-defendant and partner; it affirmed Respondent's conviction because the extraneous influences were allegedly harmless as to him. The court relied on its assessment that the evidence against Respondent was "overwhelming." *People v Budzyn*, 456 Mich. 77, 566 N.W.2d 229, 240-41 (1997).

In the habeas corpus proceedings, both in the district court and court of appeals, the only issue has been whether the admitted federal constitutional errors were harmless. Indeed, at the hearing on Respondent's petition, the district court and counsel for the state engaged in the following colloquy:

> THE COURT: Do you agree with the Michigan Supreme Court that constitutional errors were made in this case?
>
> MS. AGNELLO: Yes, constitutional trial error was made and those were the extrinsic influences.
>
> THE COURT: So you really have no argument with that?
>
> MS. AGNELLO: No. I'm accepting what the Michigan Supreme Court has in the analysis that they applied.

(12/19/97 Motion Hearing at Tr. 24). *See also Nevers, supra*, 990 F.Supp. at 867 ("[I]t is undisputed by either the Petitioner [Nevers] or Respondent [Killinger] that the Michigan Supreme Court was correct in its determination that the above cited influences constituted a constitutional error of Petitioner's Sixth Amendment and Due process rights.").

The opinion of the district court set forth the pertinent facts regarding the three (3) extraneous influences that were deemed to constitute federal constitutional error:

> On August 2, 1993, prior to the close of evidence, the trial court advised the jury that although no testimony would be heard on August 5th and 6th, they would be required to come to court on both days. *Id.* at 91, n. 13, 566 N.W.2d 229. Apparently, at the request of the jurors, the Court agreed to allow them to watch videotaped movies. The jurors were instructed by the Court that they would not be able to bring their own movies, rather, the movies would be supplied by the Court. Juror affidavits

C, D. The Petitioner's jury was given the film *Malcolm X*, among others. The jury watched approximately half of the film. Juror affidavit C.

The opening sequence of the film – based on Malcolm X's autobiography – begins with the voice of Malcolm X's character giving a speech charging the white man with being the greatest murderer on earth. *People v. Budzyn*, 456 Mich. 77, 93-96, 566 N.W.2d 229, 236-38 (1997). The voice over also specifically mentions the City of Detroit. According to the Michigan Supreme Court the narrative is as follows:

> Brothers and sisters, I am here to tell you that I charge the white man, I charge the white man with being the greatest murderer on earth. I charge the white man with being the greatest kidnapper on earth. There is no place in this world that man can go and say he created peace and harmony. Everywhere he's gone he's created havoc. Everywhere he's gone he's created destruction. So I charge him, I charge him with being the greatest kidnapper on this earth. I charge him with being the greatest murderer on this earth. I charge him with being the greatest robber and enslaver on this earth. I charge the white man with being the greatest swine eater on this earth, the greatest drunkard on this earth. He can't deny the charges. You can't deny the charges. We're the living proof of those charges. You and I are the proof. You're not an American. You are a victim of America. You didn't have a choice coming over here. He didn't say "black man, black woman, come on over

> and help me build America." He said "nigger get down in the bottom of that boat and I'm taking you over there to help me build America." Being born here does not make you an American. I'm not an American. You're not an American. You're one of the twenty-two million black people who are victims of America.

Id. at 94, n. 15, 566 N.W.2d 229.

Even more significant than the provocative language cited above is that during this voice over narration, footage of Rodney King being beaten by Los Angeles police officers is interspersed with a picture of an American flag. *Id.* at 93-94, 566 N.W.2d 229. The footage of Rodney King being beaten is shown in slow motion – and repeated eight times – as the American flag begins to burn. *Id.* In addition, the narration makes explicit reference to the City of Detroit:

> [W]e didn't see any democracy on the streets of Harlem, . . . on the streets of Detroit. . . . No, we've never seen democracy. All we've seen is hypocrisy. We don't see any American dream. We've experienced only the American nightmare.

Id. at 94, n. 15, 566 N.W.2d 229.

Later, in another scene in the film, the Malcolm X character makes obvious reference to white police officers when he states:

> No, I'm telling you that devil has made dead souls out of you and I. . . . Why, my brothers and sisters, he should get down on his knees. He should beg our mercy. Oh. My brothers and sisters, his kind has committed God's greatest crime against your and my

> kind every day of his life. He ought to get on his knees and say he's committed the crime. But does he do that? Does he do that? No. No, he scorns you. He splits your head with his night stick, he busts you upside the head with that billy club, he calls you a nigger. I'm telling you he calls you a coon. That's what he says to you – "Boy," "Nigger." Four hundred years is long enough. You're been sitting down, laying down, and bowing down for four hundred years. I think it's time to stand up.

Id. at 94-95, 566 N.W.2d 229 (emphasis added).

The Michigan Supreme Court found that viewing the movie with its forceful words and images could have triggered an inappropriate emotional response in the jury because the defendants' conduct, as alleged, matched that described by the Malcolm X character, as well as the images shown in the opening sequence of the film. *Id.* at 96, 566 N.W.2d 229. The court found that it may have been difficult for the jury to set aside those words and images and examine, bias fee [sic], the testimony of the defendants as well as that of other prosecution witnesses. *Id.* at 96-97, 566 N.W.2d 229. As the state court said:

> In focusing the jurors attention in a very emotional way on the racial element of the crime, the images from the film invited the juries to view the instant crime as part of a pattern of police brutality, effectively asking them to redress this injustice. The juries were, however, bound to decide the case on only the facts as presented at trial and to

> weigh defendants' credibility without consideration of these extraneous factors.

Id. at 97, 566 N.W.2d 229.

In addition to being shown the *Malcolm X* film, at least one member of the petitioner's jury learned during deliberations that the City of Detroit was bracing for a riot in the event of an acquittal. *Id.* at 98, 566 N.W.2d 229. According to the juror affidavits the juror was aware of the fact that "in the event of a riot, they were going to close the freeways. . . . [and] the National guard was being put on alert for our verdict." *Id.* at 98, n. 21, 566 N.W.2d 229. The Michigan Supreme Court thus held that although the jurors obviously should not have considered whether there would be a riot if they acquitted the defendants, "the reality is, however, that the jurors' knowledge that the city was preparing for a possible riot may have caused them to fear an acquittal." *Id.* at 98, 566 N.W.2d 229.

Furthermore, the jurors were exposed to, and considered, information that petitioner had previously been a member of the highly controversial police unit STRESS.[9] Although this information

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[9] The acronym STRESS stood for: Stop The Robberies Enjoy Safe Streets. The unit was a controversial decoy unit of the Detroit Police Department that gained a reputation for brutality after 20 people, most of them black, died at the hands of police officers over a three year period. *People v. Budzyn*, 456 Mich. 77, 90-91, 566 N.W.2d 229, 236 (1997); *See also* Petitioner's Appendix, V. II, pg. 394a. As a juror from Petitioner's jury stated "[i]t was explained during deliberations that STRESS was a police group that regularly abused young black males in the city."

Juror affidavit C. The group was disbanded by then Mayor Coleman Young in 1974. Petitioner's Appendix, V. II, pg. 394a.

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was not introduced at trial, the jurors considered it during their deliberations, and apparently considered it significant: "During deliberations, Mr. Nevers' participation in STRESS was discussed, and it kind of set the tone from the beginning of our deliberations. It was explained during deliberations that STRESS was a police group that regularly abused young black males in the city." Juror affidavit C.

The Michigan Supreme Court found the fact the jury considered such information highly prejudicial. The court correctly states that:

> This is the kind of concrete, factual evidence that could substantially compromise the ability of a jury to issue a fair verdict because the evidence relates directly to the past conduct of the police officers. This extraneous influence creates more than an emotional reason to convict. It suggests . . . that these officers may have been acting in accordance with their preexisting racist predisposition to target young black men for abuse when they encountered Malice Green. . . . It is the kind of evidence that has a direct and rational connection between it and an adverse verdict. . . . Similarly, in hearing that defendant [sic] were members of an allegedly violent and racist unit, the juries' ability to resolve factual questions

> before them may have been severely impaired.

Id. at 99-100, 566 N.W.2d 229.

Nevers, supra, 990 F.Supp. at 865-67.

RESPONDENT'S ARGUMENT

It is Respondent's position that this Court should deny review on certiorari for three distinct reasons. First, under Supreme Court Rule 10, the issue raised by Petitioner is inappropriate for review by this Court since it consists of the alleged misapplication of a rule of law that Petitioner concedes is properly stated. Second, the Court of Appeals's alleged failure to apply the correct legal standard makes no difference in this case since Respondent would prevail under any applicable standard. Third, the court of appeals, in its well-reasoned opinion, did apply the correct standard in this context.

Rule 10 of the Rules of the Supreme Court of the United States provides in pertinent part as follows:

> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Here, in its Petition for a Writ of Certiorari, Petitioner asserts error consisting of the misapplication of a rule of law that Petitioner concedes is properly stated by the Sixth Circuit. Under the "Reasons for Granting the Writ," after discussing the First Circuit's approach to habeas

cases under the Antiterrorism and Effective Death Penalty Act (AEDPA), Petitioner states as follows:

> In this case [*Nevers v. Killinger*], the [Sixth Circuit] Court of Appeals appropriated the language of [*O'Brien v. Dubois*, 145 F.3d 16 (1st Cir. 1998)] as a means of giving clarity to the "debatable among reasonable jurists" test which the Sixth Circuit had already adopted. Petitioner would accept that this case holding does not create a new hybrid test, but rather provides a clear and comprehensive manner of stating the "debatable among reasonable jurists" test. However, the Court of Appeals's *application* of the test in this case is so flawed as to reveal a strong reluctance to move from the de novo mode of review to a deferential review of State court decisions, which of course is what is mandated by the AEDPA[.]

Petition at 13 (emphasis in original).

Thus, by its own terms, the Petition in this case takes issue with the *application* of a test under the AEDPA that is not only "properly stated," but is in fact endorsed by Petitioner. It is precisely this type of claim, as reflected in Rule 10, that is inappropriate for review by this Court.

In addition, this Court should not grant review because Respondent would prevail under any applicable standard. The perceived errors in the Sixth Circuit's opinion, even if "corrected," would not lead to a different result. As this Court stated in *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945), "[O]ur power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected

its views of federal laws, our review could amount to nothing more than an advisory opinion." *See also Coleman v. Thompson*, 501 U.S. 722, 729 (1991) (citing above language from *Herb*).

Here, Petitioner is critical of the Sixth Circuit's statements regarding the relationship between, on the one hand, the new AEDPA and *Chapman v. California*, 386 U.S. 18 (1967), and, on the other hand, the established habeas standard under *Brecht v. Abrahamson*, 507 U.S. 619 (1993), and *O'Neal v. McAninch*, 513 U.S. 432 (1995), in the context of this case. It is Respondent's position, as the district court explicitly found and the court of appeals implicitly found, that under any applicable standard he would prevail. *Nevers, supra*, 990 F.Supp. at 874; *Nevers, supra*, 169 F.3d at 371-72.

Conspicuous by its absence in the Petition in this case is any allegation that a different view of the law would make any difference in the result. Indeed, this case has been accurately characterized as a credibility contest at every level – the state supreme court,[1] the federal district court,[2] and the federal court of appeals[3] – thus making it

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[1] *People v. Budzyn*, 456 Mich. 77, 100, 566 N.W.2d 229, 239 (1997) (extrinsic evidence regarding STRESS was damaging, "particularly in a case, like this one, that was a credibility contest.").

[2] *Nevers v. Killinger, supra*, 990 F.Supp. at 873 ("Thus, rather than physical evidence, it was clearly Petitioner's credibility, or lack thereof, which resulted in his conviction.").

[3] *Nevers v. Killinger*, 169 F.3d 352, 372 (6th Cir. 1999) ("It was the province of the jury alone to determine Nevers's credibility and the veracity of his testimony. The extraneous information that the jury was exposed to during the course of the trial, and

peculiarly inappropriate for a finding of harmlessness based on "overwhelming evidence" of guilt. Moreover, the fact that Respondent was convicted of the more serious offense of murder, as opposed to manslaughter, counsels strongly against a finding of harmlessness. As such, since Respondent would prevail under any formulation of the AEDPA standard, this Court should not grant certiorari only to render what would amount to an advisory opinion.

Finally, Respondent submits that the Sixth Circuit, in the context of assessing the state court's finding of harmless error, applied the correct AEDPA standard based on *Brecht* and *Chapman, supra. See Nevers, supra,* 169 F.3d at 371-72.

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particularly the information regarding STRESS, unquestionably had the potential for influencing how the jury viewed Nevers's testimony about his motivation for beating Green, and the Michigan Supreme Court acknowledged as much.").

CONCLUSION

WHEREFORE, Respondent respectfully requests that this Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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